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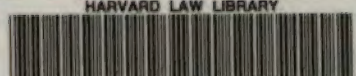
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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

COURT OF APPEALS

OF THE

STATE OF NEW YORK.

BY E. PESHINE SMITH,
Counsellor at Law.

VOL. VII.

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JUDGES OF THE COURT OF APPEALS.

GEORGE F. COMSTOCK, Chief Judge.

SAMUEL L. SELDEN,
HIRAM DENIO,
HENRY E. DAVIES, } Judges.

THOMAS W. CLERKE,
WILLIAM B. WRIGHT,
WILLIAM J. BACON,
HENRY WELLES, } Justices of the Supreme Court, and *ex officio* Judges
of the Court of Appeals, from January 1, 1860, to
January 1, 1861.

AN ACT IN RELATION TO THE JUDICIARY.

[Ch. 290 of 1847.]

"§ 5. The judge of the Court of Appeals elected by the electors of the State, who shall have the shortest time to serve, shall be the Chief Judge of said court.

"§ 6. Four justices of the Supreme Court, to be judges of the Court of Appeals, shall every year be selected from the class of said justices having the shortest time to serve; and alternately, first, from the first, third, fifth and seventh judicial districts, and then from the second, fourth, sixth and eighth judicial districts; and shall enter upon their duties as judges of the Court of Appeals on the first day of January, and serve as judges of said court one year."



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ARGUED AND DETERMINED

IN THE

COURT OF APPEALS

OF THE

STATE OF NEW YORK,

March Term, 1860.

In the Matter of the Application of HENRY B. GIBSON, for an Order appointing a Receiver of OLIVER LEE & Co's BANK, of Buffalo.

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Article 8, section 7 of the Constitution of 1846, subjecting the stockholders of banks to personal liability, applies as well to banking corporations then existing, as to those created afterwards.

The rule of interpretation by which that construction of a statute is to be avoided, which gives it a retrospective operation, has little if any application in construing the organic law.

The provision of the general banking law reserving to the Legislature the power to alter or repeal it, forms a part of the contract with every association formed under that act, and the State may modify it, prospectively or retrospectively, without infringing the provision of the Federal Constitution against laws impairing the validity of contracts.

Such modification may be made, it seems, as well by a change of the State Constitution as by an act of the Legislature.

The articles of association of a corporation formed in 1844, under the general banking act of 1838, provided that the shareholders should not be individually liable for any contract of the association. It issued circulating notes after 1850 as before: *Held*, that the stockholders are personally liable under the Constitution, and ch. 226 of 1849.

Although the issuing of circulating bills after 1850, by which the liability is incurred, be the act of the corporation as such, and not of the stockhold-

In the Matter of Oliver Lee & Co's Bank.

ers, and although a stockholder be unable to prevent it, the liability attaches in consequence of the exercise of a power which he has conferred upon the corporation, and is therefore within his contract.

APPEAL from a final order made in the Supreme Court, in a proceeding taken pursuant to the act of 1849, to enforce the responsibility of stockholders in certain banking corporations and associations, &c. (*Ch.* 226.) Oliver Lee & Company's Bank, at Buffalo, was organized pursuant to the general banking law of 1838, and commenced the business of banking in January, 1844. It stopped payment and became insolvent in September, 1857; and this proceeding was instituted soon afterwards at the instance of one of the stockholders. The association at all times prior to its failure issued bank notes to circulate as money. By the articles of association, the associates declare themselves contracting parties with the People of the State of New York, under the act of the Legislature, and accept the privileges and franchises thereby tendered to any association organizing under the act. The 14th section is in the following words: "The shareholders of this association shall not be liable in their individual capacity for any contract, debt, or engagement of the association;" and the certificate of incorporation contained a similar provision.

By the report of the referee appointed under the 16th section of the act, it appeared that the capital stock of the association at the time of its failure, was \$170,000, and that it was held by eight individuals in different proportions; and that its unpaid debts and liabilities exceeded the sum of \$500,000, all of which were contracted after January 1, 1850; and that the assets in the hands of the receiver, together with the assessment upon and collection from the shareholders of \$170,000, would not under any circumstances produce a sufficient amount to pay the debts. The referee accordingly proceeded to apportion the sum of \$170,000 among the individuals whom he had ascertained to be shareholders, in proportion to the number of shares respectively held by them; charging the appellant Watts Sherman, with \$7,000; the appellants Duncan, Sherman & Co., with \$50,000 of the amount. Upon the hearing before the referee,

In the Matter of Oliver Lee & Co's Bank.

these appellants submitted certain objections, and among others, those relied upon on the present appeal, namely, that the provisions of the Constitution of 1846 (*art. 8, § 7*), and that of the act of 1849, prescribing and enforcing the liabilities of stockholders, did not apply to banking corporations or associations created before the adoption of the Constitution; but if by the true construction of the Constitution and statute, they did apply to such banks, they were respectively violations of the provision of the Constitution of the United States, by which the States are forbidden to pass any law impairing the obligation of contracts. (*Art. 1, § 10, ¶ 1.*) The referee overruled the objection, and his report was confirmed at a special term. Final judgment was entered pursuant to the act, which was affirmed at a general term of the Supreme Court. Watts Sherman, and Duncan, Sherman & Co., appealed.

John K. Porter, for the appellants.

John Ganson, for the respondent.

DENIO, J. The first question to be determined relates to the construction of the constitutional provision imposing personal liability upon the stockholders of banks (*Const., art. 8, § 7*); and the inquiry is whether it is limited to banks thereafter to be created, or applies equally to existing banking corporations. There is nothing in the language which looks to a discrimination between the two classes. It declares, generally, that the stockholders in every corporation and joint-stock association for banking purposes, issuing bank notes, after January 1, 1850, shall be individually responsible, &c. If we look to the apparent object of the provision, no motive can be discovered for confining its operation to future banks. The intention was to protect more adequately the creditors of these institutions, and to take from their proprietors, to a qualified extent, the shield afforded by the corporate personality in which their individual ownership was merged. There were strong reasons for the establishment of a uniform system in this respect, if it could be

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done without manifest injustice. The existing banks were numerous, and if they were exempted from the principle of personal liability, it would be a long time before it would be generally established. By the general banking law, the associations had the power to prescribe for themselves the duration of their corporate existence, and a long term had generally been named. Hence, if the rule of personal liability only reached the case of future banks, there would continue to be two classes of banking institutions for many years to come. The defendant's counsel insists that we should not construe the clause so as to disturb vested interests, unless compelled by language which would not admit of any other meaning. But we are not to interpret the Constitution precisely as we would an act of the Legislature. The Convention was not obliged, like the legislative bodies, to look carefully to the preservation of vested rights. It was competent to deal, subject to ratification by the people, and to the Constitution of the Federal Government, with all private and social rights, and with all the existing laws and institutions of the State. If the Convention had so willed, and the people had concurred, all former charters and grants might have been annihilated. When, therefore, we are seeking for the true construction of a constitutional provision, we are constantly to bear in mind that its authors were not executing a delegated authority, limited by other constitutional restraints, but are to look upon them as the founders of a State, intent only upon establishing such principles as seemed best calculated to produce good government and promote the public happiness, at the expense of any and all existing institutions which might stand in their way. The rule laid down in *Dash v. Van Kleeck* (7 John., 477), and other cases of that class, by which the courts are admonished to avoid, if possible, such an interpretation as would give a statute a retrospective operation, have but a limited application, if any, to the construction of a Constitution. When, therefore, we read in the provision under consideration, that the stockholders of every banking corporation shall be subject to a certain liability, we are to attribute to the language its natural meaning, without inquiring whether

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private interests may not be prejudiced by such a sweeping mandate. But, independent of this consideration, there is enough on the face of the provision to show that it was intended to apply to all banks of issue, which should be in existence three years after the Constitution should take effect, without regard to the time when they were created. The individual responsibility was applied only to banks which should issue bank notes or some kind of paper credits to circulate as money after the 1st day of January, 1850, and only to such debts of those banks as should be contracted after that day. The delay was apparently afforded in order to enable the proprietors of existing banking institutions to determine whether they would remain banks of issue, and assume the burden of individual liability, or avoid that consequence by winding up their affairs, or confining themselves to other branches of banking. It is impossible to suggest any other motive for postponing the operation of the provision. If the existing banks were to be exempt from its influence during the continuance of their charters, no delay would be needed on their account; and as to future banks to be organized under general laws, their proprietors would embark in the business with a full knowledge of its hazards and responsibilities, and hence would not require any time to accommodate themselves to it, and would have no reason to complain of the sudden change of policy. If, therefore, it were doubtful, upon the general language of the provision, whether the banks already established were intended to be embraced, the postponement of its operation for three years, for no conceivable motive but their convenience, would show very clearly that they were intended to be brought within its scope at the expiration of that period. If we look into the proceedings of the Constitutional Convention, we shall find the most authentic evidence that the actual intention of its members was such as I have supposed. It appears that while the article in which the provision is found was under consideration, Mr. Kirkland, a member from Oneida county, moved to amend it, so as to confine the individual liability to corporations and associations

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thereafter to be formed; but the amendment, after considerable debate, was negatived. (Debates, Argus ed., 664-666.)

But the position most strongly relied upon by the appellants' counsel is, that the provision, if valid, would operate to impair the obligation of a contract; and hence that it is a violation of the Constitution of the United States. Upon this branch of the case, certain principles have been established by the Federal Supreme Court, and are no longer subjects of controversy. That court having paramount jurisdiction upon questions arising under the Constitution of the United States, we have only to ascertain what has been distinctly determined by it, and to apply those doctrines to the case before us. Thus it has been adjudged that an executed grant is as fully within the constitutional protection as an executory agreement. Hence, a conveyance which takes effect to transfer a title by the delivery of the instrument, cannot be revoked or impaired by State legislation. (*Fletcher v. Peck*, 6 Cranch, 87, 136-139.) Then the provision is not limited to dealings between individuals, but extends equally to contracts between the State sovereignties and private parties; nor, in respect to contracts to which the State is a party, is it confined to such as relate to definite pecuniary obligations or to specific real or personal property. It embraces charters and grants of corporate powers and privileges, when conferred for private and pecuniary objects. (*Dartmouth College v. Woodward*, 4 Wheat., 518; *Green v. Biddle*, 8 id., 2; *Gordon v. The Appeal Tax Court*, 3 How., 138; *State Bank of Ohio v. Knoop*, 16 id., 369; *Dodge v. Woolsey*, 18 id., 331.) And it also applies to corporations created under general laws. Such statutes are considered as propositions extended to private citizens; and when they are accepted, and a corporation has been organized pursuant to their provisions, a contract between the State and the private adventurers is created, which is equally inviolable as the terms of a charter granted by special statute. In the case of *State Bank v. Knoop*, just referred to, a provision in the general banking law of Ohio prescribing a tax of six per cent of the profits of the banks formed under it, in lieu of all taxes

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to which it or the stockholders would otherwise be subject, was held to be a contract against further taxation, which was within the protection of the Constitution. It follows from these adjudications that if the general banking law of this State had not contained any reservation of a right to repeal or change it, the associations organized pursuant to its provisions would have been the proprietors of franchises held under contracts with the State, which would have been beyond the reach of legislation.

It has also been held by the Supreme Court, that the change of a State Constitution can no more operate to abrogate or essentially change a contract of this character, than an ordinary act of legislation. In *Dodge v. Woolsey* (*supra*), the Legislature of Ohio had, in 1845, chartered a bank called the Commercial Branch Bank of Cleveland, with a provision for limited taxation. By the amended Constitution of that State, adopted in 1851, it was declared that all property employed in banking, whether by banks then existing or thereafter to be created, should always bear a burden of taxation equal to that imposed upon the property of individuals. A stockholder of the bank filed a bill in the Circuit Court of the United States against the officers of the State, whose duty it was to collect a tax assessed under a State law passed in pursuance of the Constitution; and a decree was made, perpetually enjoining the collection of the tax, which was affirmed by the Supreme Court. The court said that a change of Constitution could not release a State from contracts made under a Constitution which permitted them to be made. These decisions of a tribunal which is entitled to sit in review of our judgments upon questions arising under the Federal Constitution, must necessarily be binding on us. We are not at liberty to inquire whether they do not impose restraints upon the State sovereignties, not within the contemplation of the authors of the Constitution of the United States, whatever might be our opinion if the question were open to our consideration.

The question before us is, therefore, narrowed to a consideration of the effect of the provision in the general banking law

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by which the right is in terms reserved to the Legislature to alter or repeal it at any time. (Laws of 1838, 253, § 32.) This, according to one view, is the reservation of a right only to change or repeal it, prospectively, from the passage of the modifying or repealing law, so that the associations which had been organized in the meantime would remain unaffected by such modification or repeal. On the other hand, it is insisted that it enabled the Legislature to deal with the associations as though they were directly established by a statute containing in itself the usual reservation. I am of opinion that the latter is the correct view. By the Revised Statutes, the charter of every corporation thereafter to be granted by the Legislature, was declared to be subject to alteration, suspension or repeal, in the discretion of the Legislature. (1 R. S., 600, § 8.) This provision incorporated itself into and became part of every special charter which was itself silent as to the power of repeal or change. But notwithstanding this, and out of abundant caution, all the bank charters, and I believe all the other acts of incorporation subsequently passed, contained a standing section reserving the power to repeal or change them. Prior to the passage of the general banking law, corporations, with a few unimportant exceptions, were created by special laws. Hence the legislation referred to was indicative of a settled policy in the Legislature to make the grant of corporate franchises revocable; and if we are to construe the banking law with a certain reference to that policy, we must hold that the reservation embraced the corporations which might be created as the subjects of change or repeal, as well as the act itself. This intendment becomes stronger when we consider that the statute, as a general law, was equally capable of being prospectively changed or repealed as any other law in the statute book, though there had been no reservation of a power of repeal. Had there been, therefore, no reservation in the act, the Legislature would not have been chargeable with interfering with a contract or a vested right, had it repealed the statute prospectively, by declaring that no more corporations should be formed, or that such as should thereafter be organized should subject the asso-

ciates to unlimited personal responsibility. The clause, therefore, meant something more than the reservation of a right to interfere with the act prospectively. But again, the business of the banking associations assumed and required the continued existence of the act; for the State officers were to coöperate with the associates in the fabrication of circulating notes. The Comptroller was the depository of the securities which were to be furnished. (§§ 1, 2.) The repeal of the act would take away the powers of these officers, without the exercise of which the banks could not continue their business.

From these considerations, I am led to the conclusion that the effect of the clause in question was to reserve to the Legislature the same power over the corporations created under the act, which was contemplated by the provision of the Revised Statutes, which has been referred to, and by the standing clause contained in special charters granted since 1830, in respect to corporations created by special law. Moreover, I think this precise question has been in effect, decided in this court. In 1847, the Legislature passed an act authorizing the formation of corporations to construct and operate plankroads. The corporations were to be created by the subscribing and filing of articles of association, and there was a reservation to the Legislature of the right to alter, amend or repeal the act. (Laws of 1847, ch. 210.) There was also a right reserved to annul or repeal any corporation created under the act; but none, in terms, to alter or amend the corporation. The Schenectady and Saratoga Plankroad Company was organized under this act in 1848, and the defendant became a subscriber to the stock. Afterwards, in 1849, an act was passed, by which plankroad companies were authorized, on certain conditions, to construct branches to their main line, or extend it, and increase their capital for that purpose. (Laws of 1849, ch. 250.) In an action against a defendant on his subscription, he set up that the directors had availed themselves of the act of 1849, by increasing the capital stock and constructing a branch road without his consent. This he contended released him from his subscription by changing the contract. But we held that the defend-

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ant made his subscription subject to the contingency that the Legislature might change the act, by an amendment by virtue of the power reserved to alter or amend it. (*Schenectady and Saratoga Plankroad Co. v. Thatcher*, 1 Kern., 102.)

I do not perceive that a corporation created under a general law, like the banking act or the plankroad act, differs essentially in respect to the point we are considering, from one organized under a special statute, which does not, *ipso facto*, create a corporation. Nearly all the charters of recent corporations are simply enabling acts. Commissioners are named to open books for subscription to the stock, and to distribute it among the subscribers in case of an excess of subscription: then an election of directors is to take place, and the company is to go into operation. The charters usually close with a section declaring that the Legislature may at any time alter or repeal the act. A corporation is thus brought into existence by performing the acts pointed out by the statute; but as it is not created by the act itself, but only authorized to be created by the voluntary acts of others, the power to alter or repeal the act is not, in strictness of language, an authority to interfere with a corporation duly created according to its provisions. The case appears to me entirely parallel with those of corporations formed under general laws; yet it has always been considered that the reservation enabled the Legislature to act directly upon the corporation. In *The Buffalo and New York City Railroad Company v. Dudley* (4 Kern., 336), the question was whether the alteration by the Legislature of the constitution of a railroad corporation, by changing its name, increasing its capital and extending its road line, discharged the defendant from his liability on a subscription to its stock; and it was held that it did not. The act under which it was incorporated was such an enabling one as has been mentioned, and the reservation was of a right to alter or repeal the act. (Laws of 1845, ch. 336.) This court held that the amending act was within the power reserved.

Upon the whole, I am satisfied that the legislative contract between the State and the associates in this bank, contained in

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itself a provision which saved and reserved to the Legislature the right to withdraw the franchises granted or to modify them at its pleasure.

But it is argued that they could not be revoked or altered by a change of the Constitution, even if it could be done by the Legislature. We have seen that the Supreme Court of the United States has held that a State constitutional provision, acting prejudicially upon a contract, is a law passed by a State impairing its obligation, within the inhibition of the Federal Constitution. This is upon the ground that the substance of the provision is, that the State shall not interfere in any way with the rights which citizens have acquired by contract. It may be said with equal reason, and without any greater departure from the strict meaning of language, that the reservation contained in the laws under which corporations are formed, looks to a revocation of the franchises by any legal act which shall possess the force of law, though not strictly an act of legislation. But it is unnecessary to rely upon this answer to the argument. The act of 1849, under which this proceeding was commenced, adds the legislative sanction—if any were necessary—to the mandate of the Constitution; for it declares the liability of the stockholders to the same extent and under the same circumstances. The right reserved in the general banking law has therefore been exercised in the precise manner indicated by its language.

It is argued that because the act left it to the election of the stockholders to determine whether they would embark in the business upon the footing of personal liability, or upon that of corporate liability only, and they declared by the articles that they would not incur any individual responsibility, a private contract was established which was beyond the influence of the clause allowing a modification or repeal of the act. It is not in the power of the associates, by any stipulations inserted in their articles of association, to limit the power of the Legislature under the reservation contained in the act. These associations originally had the power to issue negotiable paper, payable on time, upon proper occasion, provided it was not of a character

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to circulate as money. In 1840, the Legislature passed an act making it unlawful to issue any such paper, unless it should be payable on demand. Suppose the articles had expressly provided that the associations should have the right to issue such time paper, no one, I presume, could doubt but that the act would effectually take away that power, though it was allowed by express stipulation in the articles.

It might be safely admitted that neither the people in their Constitution nor the Legislature could convert a debt which at the time it was contracted bound no one but the corporation, into the private debt of the stockholders. But this has not been attempted. None of the debts owing before the Constitution took effect, nor any of those which were contracted within three years afterwards, are charged upon the stockholders. The power of the corporation to contract at all was a corporate franchise, and subject to the control of the Legislature by force of the reservation. They might wholly annihilate the power to contract by repealing the act, or continue it, subject to such conditions or restrictions as they saw fit to impose. Where a party has a discretion to prohibit an act altogether if he considers it best for his own interest, he is never bound absolutely and unconditionally to forbid it. He may allow it on such conditions as he supposes may be consistent with his interests. What the Legislature did was, to continue the power to contract upon the corporate credit alone, on condition that the association would relinquish the faculty of issuing a paper currency after January 1, 1850; and to declare that if it should elect to remain a bank of issue after that day, it should not incur debts on the sole credit of the corporation; but it might in that event continue to make contracts after that day, upon the corporate credit, with a limited personal responsibility superadded. The association elected to retain the faculty of issuing bank notes, and thereby voluntarily assumed, so far as it was competent to do it, in behalf of its stockholders, the individual liability attached to its contracts by the Constitution and the act of 1849.

But it is said that the corporation could not, by any act or omission of its own, implicate its stockholders in a liability

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which they had not consented to assume, and which, on the contrary, they had declared they would not incur. But they had voluntarily consented to become stockholders upon the conditions held out by the general banking law. One of these conditions was that the Legislature might amend and alter the act, and in that way change and modify the constitution of the corporation. A change under this reservation to alter might render their investment more or less profitable, and their position more or less hazardous. Whatever peril it entailed they consented to assume. Stockholders cannot put in the plea *non hæc in fœdera veni*; for, although they have not by a direct act become parties to the contracts of the association, they have conferred powers upon others to contract, to a limited extent, in their behalf. In the first place, they have empowered the corporation to affect their individual interests to the extent of the corporate authority, and then they have agreed that the corporate power may be changed by the Legislature. That change might operate by way of restriction or extension. In fact it was materially enlarged. Originally the acts of the corporation could only affect the shareholders to the amount of their contributions to the capital stock, but by the enlargement of its powers it was enabled to make contracts which might call for a further contribution of an equal amount. The super-added liability is as clearly within their contract as that incurred in the first instance; for it has been incurred, according to the terms of an arrangement to which they were parties. In the two cases referred to from Kernan's Reports, the defendants insisted that they had never contracted to embark their money in the enterprises which were being actually prosecuted by the directors; but the answer which this court gave was that they had voluntarily embarked their credit in corporations, whose powers were liable to be enlarged by the Legislature.

It is further argued that the appellants, supposing them to hold only the minor part of the stock of the association, had no means of embracing the alternative held out by the constitutional provision and the act of 1849, of abandoning the business of issuing bank notes. This may be true; but it is the same

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disability which attaches to every stockholder in a corporation, who cannot control a majority of the stock. The direction may do acts which he wholly disapproves, but, as many persons have found to their cost, he is utterly powerless to arrest the proceedings of the governing authority. Whether the power which is exercised originally belonged to the corporation or has been superimposed by competent authority, his liability for its acts is of the same character.

The power of a State Legislature to impose personal liability upon the stockholders of a corporation for debts created subsequently to the passage of the act prescribing the liability, has been affirmed by the Supreme Court of Maine. (*Stanley v. Stanley*, 13 Shepley, 191.) A manufacturing company was chartered in 1833. There was a prior act passed in 1831, declaring that the Legislature might alter or repeal any act of incorporation. In 1839 an act was passed making the stockholders in corporations chartered after 1831, personally liable for debts contracted after the act of 1839. The company incurred a debt in 1841, and the plaintiff subsequently purchased stock in the corporation, and his property was taken on an execution against the company; that being the mode, in that State, of enforcing the personal liability of stockholders. In an action of trespass against the sheriff, the court held the plaintiff liable for the debt, and gave judgment for the defendant. They said "if the corporators were not satisfied with their individual liabilities so created, they had it in their power to cease creating them."

My conclusion is that the provision in the Constitution and in the act of 1849, which imposed upon the stockholders of banks the personal liability which was enforced by the proceedings under review, did not impair the obligation of any contract to which the appellants were parties. If this view is concurred in by my brethren, the order appealed from must be affirmed.

SELDEN and BACON, Js., expressed no opinion; all the other judges concurring,

Judgment affirmed.

OGDEN v. PETERS *et al.*

The solvency of a debtor, in his own estimation or in fact, does not invalidate his assignment of all or any portion of his property for the payment of his debts.

An intention to hinder or delay creditors is fraudulent and avoids the assignment, but such intention cannot be inferred from the solvency any more than the insolvency of the debtor.

A direction in the assignment to the trustee "to convert the assigned property into cash as soon as the same may conveniently and properly be done" is supererogatory and harmless.

APPEAL from the Supreme Court. Action to set aside an assignment. The trial was before Mr. Justice EMOTT, without jury. He found these facts: The defendant Peters, being in fact insolvent to a large amount, but supposing that his property was sufficient to pay his debts, made, on the 29th September, 1849, a general assignment of all his property and choses in action to the defendants Doughty and Brock, in trust "to sell the said assigned and conveyed property and effects, to collect the said choses in action, evidences of debt, &c., and to convert the whole of the said assigned premises into cash as soon as the same may conveniently and properly be done," and to apply the proceeds for the payment of his debts according to a declared order of preference. The judge found that the assignment was not fraudulent in fact and determined as matter of law that it was valid on its face. He ordered judgment dismissing the complaint, which having been affirmed at general term in the second district, the plaintiff appealed to this court.

Gilbert Dean, for the appellant.

John K. Porter, for the respondent.

COMSTOCK, Ch. J. The assignment is not void for the reason merely that it contains a provision directing the assignee to

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convert the property "into cash as soon as the same may conveniently and properly be done." The rule undoubtedly is, that an insolvent debtor cannot create a trust of this nature and impose upon the trustee any restrictions inconsistent with the right of creditors to have the assigned property converted immediately into money for the payment of their demands. An assignment drawn precisely as it ought to be will not undertake to speak to the assignee in regard to his duties under the trust. Those duties, unless the creditors themselves direct otherwise, are simply to convert the estate and pay the debts in the order and with the preferences indicated in the instrument. A trustee is always bound by any restrictions contained in the writing which creates the trust, and if these are inconsistent with the rights of creditors, the trust itself must fall to the ground. The law does not, in general, control a trustee in opposition to the will of the author of the trust as declared in the writing by which it is constituted; but the law can and does overthrow all schemes by which creditors are hindered, delayed or defrauded. In this particular case we think the direction to the assignee was harmless although it was entirely supererogatory. We consider it harmless because it has no definite meaning at all. The language may be criticised but it cannot fairly be construed as conferring any power or direction outside of the simple and plain duty of the assignee to go on at once, convert the estate and pay the debts.

It was found at the trial as a conclusion of fact, that the assignor when he made the assignment supposed that his property was sufficient to pay his debts, and on this ground it is said that the law condemns the transaction. As assignments for the benefit of creditors are generally made by insolvent debtors, it is not unfrequently urged that such dispositions of property can be made only by that class of persons. But this doctrine has no foundation in principle or authority. These assignments are in their nature simply trusts for the payment of debts. The power to create such trusts is certainly not peculiar to insolvent men. On the contrary it is a power more unquestionably possessed by men who are entirely solvent. In

England insolvent assignments fall under the condemnation of the bankrupt system. But there, as well as here, persons of undoubted ability to pay their debts can dispose of their property as they please, so far as the question of power merely is concerned. This right of disposition, on general principles of law and justice, was never doubtful except in case of a debtor's inability to meet his engagements. In that condition the claims of creditors are in justice paramount, and the debtor's power to dispose of his estate, even for their benefit, was not established without a struggle. In short, it was the insolvency rather than the solvency of a debtor which suggested the doubt in regard to the right of putting the whole or any part of his property in trust for the benefit of creditors. It is undoubtedly true that a solvent as well as an insolvent person may make a fraudulent assignment. In either condition, the question is one of fact, depending mainly on other circumstances, where the instrument is on its face free from obnoxious provisions.

It has been urged that a debtor having, as he believes, an estate more than sufficient to pay all his debts, but nevertheless embarrassed by their immediate pressure, and fearing a sacrifice, has no right to withdraw his property from legal process and delay his creditors by the interposition of a trust. This argument has the same force in the case of admitted insolvency. In either case if the intention is to hinder or delay creditors the transaction is fraudulent, but that intention cannot be inferred from one condition of the assignor any more than from the other. It is admitted that an insolvent may assign the whole or any part of his estate. It is a perfectly clear proposition that a person not only solvent but unembarrassed may do the same thing. Is there then an intermediate condition between solvency entire and complete, and total insolvency where the right and power to create such a trust do not exist? According to plain rules of logic and law, I think there is not.

The authorities cited in support of the doctrine contended for do not sustain it. In *Ward v. Trotter* (8 Mon., 1), the deed of trust declared that the debtor made the assignment "to pre

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vent a sacrifice of his property, which he deemed ample for the payment of his debts." One of the objects of the trust therefore, was to prevent a sacrifice, and this was illegal because the creditors, in their election, had a right to demand an immediate conversion, although at a loss to the debtor's estate. The assignment was therefore adjudged to be void. A similar doctrine was laid down in *Vernon v. Morton* (8 Dana, 247, 263). These Kentucky cases were cited in *Van Nest v. Yoe* (1 Sand. Ch., 4). In that case the illegality did not appear on the face of the instrument, but the answer admitted that the assignment was made with a view to have a solvent but embarrassed estate "*turned to the best account*." This was understood to be a confession that the motive of the debtor was to procure an extension of time so as to save a larger surplus to himself. Some observations of the Assistant Vice-Chancellor may go further than he was required to go by the precise facts before him. But the case itself is by no means an authority for saying that a solvent debtor may not make an honest and valid assignment.

It is claimed that the complaint in this case is so framed as to justify a decree that the assignee account for the estate which went into his hands, even assuming that the assignment is valid. This view of the case does not appear to have been urged at the trial, and there is in the record no exception which raises such a question.

We think the judgment must be affirmed.

All the judges concurred; SELDEN, J., excepting, however, to that portion of the opinion which, as he thought, implied that it might be indifferent upon the question of actual intent to hinder and delay creditors whether the debtor was solvent or insolvent. In the former case there appeared a presumption that the motive of the assignor was to increase an anticipated surplus for himself.

Judgment affirmed.

JEWETT v. BANNING.

In an action for an assault and battery committed in the absence of witnesses, ill-will on the part of the defendant towards the plaintiff is admissible as a part of the circumstantial evidence to determine by whom the assault was committed.

The plaintiff charged the defendant with having committed the assault, and he denied it. The evidence warranted the jury in finding that the charge was repeated at the same place, and in the presence of additional witnesses, shortly afterwards, without a repetition of his denial by the defendant: *Held*, no error in the judge to submit it to the jury to give such weight to the defendant's omission again to repel the charge, as under the circumstances it might be entitled to.

APPEAL from the Supreme Court. Action for an assault and battery, alleged to have been committed by the defendant upon the plaintiff, on the 12th of November, 1852. The defendant was the brother of the plaintiff, and the assault was averred to have taken place at the house of the plaintiff, to which the defendant went, on the morning of the 12th of November, and when no one was in or about the house, except the parties. On the trial, evidence was offered tending to show that the plaintiff, immediately before the defendant was seen to go to the house on the day named, was in good health and free from injury to her person. That when next seen after the defendant left her house, she was bruised and injured, and in such a manner as to have satisfied the jury that those injuries were not inflicted by herself, but by another.

The main question was, whether these injuries were inflicted by the defendant. Evidence of a circumstantial character was given to show that they were; and to support that inference, the plaintiff offered testimony tending to show ill-feeling on the part of the defendant towards her, at and immediately preceding the alleged assault.

Testimony was also offered tending to show that a few days subsequent to the alleged assault, the plaintiff and defendant, being present in company with others, the plaintiff charged the

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defendant with having committed the assault, and exhibited the bruises on her arms as evidence of her charge. The defendant denied her allegations, and after an interval of from half an hour to an hour, other persons being present than those when the charge was first made, she repeated it, with some variation, to which the defendant then made no reply.

The judge charged the jury, that if they were satisfied from the testimony that there existed any ill-feeling on the part of the defendant towards the plaintiff, it was a circumstance to be taken into the account; and to this part of the charge the defendant excepted. He also instructed the jury, that if the plaintiff charged the defendant, on the occasion referred to, with committing the assault, and he at the time denied it, then it furnished no evidence against him; but if he remained silent when so charged, the jury might regard it as an admission that he was guilty, or give it such weight as they might think it entitled to. He added, that there was perhaps some doubt from the evidence, whether the charge, after it had once been made and denied, was repeated on that occasion, and if it was repeated, whether the defendant had remained silent. The judge here explained the nature and principles of such evidence, and stated to the jury, on this part of the case, that they would probably conclude that the defendant, after he had once emphatically denied the accusation on that occasion, was not called upon to deny it again if the accusation was repeated; but the court left it to the jury to give such weight to his silence, when the charge was repeated, if it was repeated, as they thought it entitled to under the rules which had been stated as to the effect of remaining silent. To this part of the charge the defendant's counsel also excepted. The plaintiff had a verdict. A new trial was granted at the special term. On appeal the order granting a new trial was reversed at general term, in the seventh district, and judgment rendered for the plaintiff. The defendant appealed to this court.

Henry R. Selden, for the appellant.

Ethan A. Hopkins, for the respondent.

DAVIES, J. The first question presented for our consideration upon this appeal, is, as to the correctness of the charge of the judge at the circuit, in stating to the jury that if they were satisfied from the testimony that there existed any ill-feeling on the part of the defendant towards the plaintiff, that was a circumstance to be taken into the account. The fact of an assault and battery upon the plaintiff, on the day named, by some one, would seem to have been established by proof satisfactory to the jury. The fact of such an assault, even from the imperfect statement of the testimony contained in the bill of exceptions, cannot well be doubted. It is sufficient, however, to say that such fact has been found by the jury, and we see no occasion to question the finding in this respect. The main question litigated before the jury, was, whether the defendant committed the assault. To satisfy them that he did, a chain of circumstances was adduced, from which it was contended, on the part of the plaintiff, that they would be justified in finding that the defendant did commit the assault. A link in this chain was the fact of ill-feeling on the part of the defendant towards the plaintiff.

This evidence was not adduced, as the learned counsel for the appellant in his argument supposed, to show the intention of the defendant in committing the assault. Neither was it offered to establish the fact that an assault had been committed. It was manifestly offered, with the intent to establish, in connection with other circumstances, the fact that the assault was committed by the defendant. It was a part of the testimony to point him out as the guilty party, and to satisfy the mind of the jury, beyond all reasonable doubt, of his guilt, by exhibiting a motive on his part.

The judge at the circuit very truly said to the jury, that the plaintiff's case, that is as to the guilt or innocence of the defendant, was entirely supported by circumstantial evidence; and he very properly added that such evidence is always competent, and is often as satisfactory as direct or positive testimony. Some jurists have said that it is even more reliable, and less liable to lead to error. Without entering that field of fruitful

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discussion, it is only necessary here to remark that it is a competent source of testimony, and if the circumstances adduced lead the mind of the jury to the inevitable conclusion arrived at, no fault can be found with it.

In the case under consideration, many circumstances were produced tending to show, as contended for by the plaintiff, that the assault was committed by the defendant. As bearing on this point of the case, it must be assumed, from the charge of the judge, that ill-feeling on the part of the defendant towards the plaintiff had been shown. Were the jury at liberty to take this circumstance into account in determining the fact whether or not the defendant committed the assault? In criminal cases, expressions of ill-will by the prisoner towards the deceased or person injured, are always admitted as having a most material bearing upon the inquiry as to the guilt or innocence of the party accused. (Burril on Cir. Ev., 835, 836, &c., and cases there cited.) It is there stated, that by this evidence we obtain an insight into the heart and mind of the party. His motives, which before could only be conjectured, or at best inferred by a process of reasoning, stand now directly revealed. His heart is, as it were, laid open to view, showing enmity or desire of revenge to be the source and spring of his whole conduct. In the case of *The People v. Rickert* (8 Cow., 226), on an issue of forcible entry and detainer, the defendant having entered peaceably, said to the relator, "It will not be well for you if you ever come upon the premises again, by day or by night," it was held that this was relevant, and might be left to the jury, from which to find a forcible detainer. In the present case, if the life of the plaintiff had been taken on the occasion, and the defendant was on trial for the homicide, the evidence would clearly be a circumstance to be taken into account in fixing guilt upon him. We are unable to see any reason why the jury might not properly take it into consideration, in determining whether or not the assault upon the plaintiff was committed by the defendant; and we think there is no error in the charge of the judge at the circuit in thus submitting it to them.

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In reference to the second exception, I do not perceive that any rule of law has been violated. The judge very properly told the jury that if, when the charge was made, the defendant at the same time denied it, it furnished no evidence against him. But there was evidence in the case tending to show that after the charge had been made by the plaintiff, and denied by the defendant, and, as we think may fairly be inferred from the testimony, in another conversation in the presence of different auditors, and after the lapse of three-fourths of an hour, the charge was repeated by the plaintiff, with some variations. The judge stated to the jury in reference to this, that they would not conclude that if the defendant had once emphatically denied the charge, he was called upon to repeat the denial on the accusation being renewed; but it was left to them to give such weight to his silence when it was repeated, if repeated, as it was entitled to under the rules he had already laid down. These rules had been most favorable to the defendant, and excluded the idea that he was bound on the same occasion of the repetition of the charge to reëfirm his denial. The charge of the judge must be understood as meaning, with the qualifications and restrictions which he had already stated, that the jury were at liberty, if they found the accusation was repeated in another conversation, and with different persons present, to give such weight to the defendant's silence, if silent he was, as under the rules laid down it might be entitled to.

The evidence would seem to have warranted the jury in assuming that there was an interval of nearly an hour between the conversation in which the charge was made and denied, and that in which it was made and the defendant was silent. It is undeniable that at least two persons were present at the last conversation who were not present at the first. If the jury could have so found, there is no just cause of complaint by the defendant as to this part of the charge. If there is any ambiguity as to the precise meaning of the judge, it was in the power of the defendant to have had it corrected at the trial. But it seems to us that the charge, in view of the facts developed at the trial, and the previous instructions to the jury, is

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unobjectionable. While the judge most explicitly and truly told the jury that the making of the charge, and its denial by the defendant, furnished no evidence against the defendant, he very properly forbore to tell them that if the charge was repeated on another occasion, in the presence of different auditors, and the defendant remained silent, his previous denial was a shield to him, and no unfavorable inference was to be drawn from his silence on the repetition. We do not see why the defendant's conduct on such repetition of the charge was not to be considered by the jury, under the rules and instructions given to them by the court. It was a circumstance of more or less weight in determining the fact as to the assault having been committed by the defendant, and as such, we think, was properly submitted for the consideration of the jury.

The judgment should be affirmed.

WRIGHT, J. The action was sought to be maintained by indirect or circumstantial proof. Whether the evidence was sufficient to carry the case to the jury was not made a question; and the jury found against the defendant. The legal questions open for discussion in this court arise on the charge of the judge.

The judge, among other things, charged that if the jury were satisfied from the testimony that there existed any ill-feeling on the part of the defendant towards the plaintiff, that was a circumstance to be taken into the account, in determining whether the defendant was guilty of the assault charged. To this then there was a general exception, raising merely the question whether ill-feeling on the part of the defendant towards the plaintiff was a fact admissible, in connection with other facts, to prove, or from which the jury might infer, that he committed the assault. It did not raise the question whether there was any or enough testimony on the point of ill-feeling to go the jury. It is now urged that if the fact were in its nature admissible, there was no evidence whatever of ill-feeling, or anything from which the jury could be authorized to infer it, and hence, in this respect, it was error in the court

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to submit the question. This objection, however, comes too late. The sufficiency of the proof of ill-feeling between the parties was not made a question on the trial; and we are not to assume that the Case, as made up, contains all the testimony on that subject. As a legal proposition, therefore, is it competent for a jury, in an action of assault and battery, sought to be maintained by circumstantial proof, to base their finding of the main issue, in any degree, upon the fact that ill-will existed on the part of the party charged towards the party alleged to have been assaulted? It is conceded that the fact of ill-will might be competent upon any question as to the intention with which an act was done. I am inclined also to the conclusion that where the act is one of personal violence, ill-feeling or animosity existing on the part of the person charged towards the one assaulted is not, in all cases, an immaterial circumstance, and to be excluded from the consideration of the jury. When an assault is proved to have been committed by some one, and the person charged is shown to have had the opportunity to commit it, it can scarcely be regarded as an immaterial circumstance for the consideration of the jury, with the view of connecting him with the act, that he was maliciously disposed towards the person assaulted. In criminal cases, the existence of ill-feeling or unlawful passion on the part of the accused has been regarded as a proper circumstance to be taken into consideration as bearing on the question of the connection of the accused with the commission of the wrong. It may be admitted that the fact of the existence of ill-feeling, of itself proves nothing: but that is not the inquiry. The point is, whether it is a fact, in connection with others, that the jury may rightly consider in inferring the alleged fact. Ordinarily, I think, where the charge is of personal violence, depending for its establishment on circumstantial evidence, the ill-will of the party charged may properly be made one of the circumstances; but from its peculiar relation to and connection with the other circumstances proved in the case under consideration I cannot doubt its propriety. The plaintiff was injured whilst the defendant was

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alone with her. The circumstances proved would have warranted the inference that the defendant seized and wrenched her arm. But he was her brother: and it was neither impossible nor very improbable that the injury was accidental or unintentional. Indeed, such an hypothesis would sooner be indulged than that a brother, without any ill-will towards her, had intentionally inflicted violence on her person. But add to the circumstances the fact that there existed ill-feeling on the part of the defendant towards the plaintiff and the case assumes a different aspect. Whereas, before, the jury may have been bewildered by the absence of motive to do an intentional wrong, now it is made to appear. The ill-will did not tend to prove the act of seizure of the arm, but it aided to determine its character and legal effect.

Evidence had been given of an interview at the plaintiff's house, some two months after the alleged battery, between the plaintiff and the defendant, in which she charged upon him the commission of the injury. The evidence left some doubt whether the charge being made and denied was repeated on the same or another occasion, and in the presence of different parties. Two witnesses on the part of the plaintiff testified to the charge being made, to which the defendant gave no denial. Two other witnesses on the part of the defendant testified to the making of the charge, and that it was followed by an instant and explicit denial by the defendant. In speaking of the occurrence at the plaintiff's house, the judge instructed the jury that if the plaintiff charged the defendant on that occasion with committing the assault, and he at the same time denied it, then it furnished no evidence against him; but if he remained silent when so charged, the jury might regard it as an admission that he was guilty, or give it such weight as they thought it entitled to; that there were some doubts from the evidence, whether the charge, after it had been once made and denied, was repeated on that occasion; and if it was repeated, whether the defendant then remained silent. To these instructions no exception was taken. The judge then explained the nature and principles of such evidence, and stated to the jury on this

part of the case, that they would not probably conclude that the defendant, after he had once emphatically denied the accusation, was called upon to deny it again if repeated; but the court would leave it to the jury to give such weight to his silence when the charge was repeated, if it was repeated, as they thought it entitled to under the rules which had been stated as to the effect of remaining silent. To this part of the charge the defendant excepted. The exception can only raise the question, whether in view of the evidence in the case, it was error to leave it to the jury to give such weight to the defendant's silence, if they found the charge to have been repeated after once being emphatically denied, as they thought it entitled to under the rules which had been stated as to the effect of remaining silent. This was not error, unless the judge was called upon to charge, as a legal proposition, under the proof in the case, that the defendant's silence, on a repetition of the charge, after having once denied it, furnished no evidence against him. Undoubtedly, if a party, in a given interview and conversation, is repeatedly charged with the commission of an act, and he denies it unequivocally once, he is not called upon to repeat the denial in order to avoid the inference of an admission of its truth against him; but if the charge be made at distinct times and under different circumstances, and in the presence of different persons, though he may have denied it at one time, his silence under accusation at another time, and under other circumstances, is a proper circumstance to be weighed by the jury. At least, the court is not called upon to instruct the jury, as matter of law, that they are to infer nothing against him from his silence. In this case, the evidence would have justified the jury in finding that the charge was made and denied in the presence of Warner and Spencer, about the commencement of the appraisal, and some three-quarters of an hour before Tripp and Jewett came in, and that the conversation had ceased before the latter arrived; and that after the arrival of Tripp and Jewett, the charge was repeated in their presence. As a matter of fact, therefore, there were two distinct conversations, in the presence of different persons and

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under different circumstances, though on the same day, in which the charge was made. I am very clear, that had the judge instructed the jury, as matter of law, that they were to give no weight to the silence of the defendant when the charge was made in the presence of Tripp and Jewett, because it had been fully and distinctly denied in a prior conversation, and substantially a different interview, that it would have been error.

The judgment of the Supreme Court should be affirmed.

SELDEN, J., expressed no opinion; all the other judges concurring,

Judgment affirmed.

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The liability to general average continues until the property has been completely separated from the rest of the cargo and from the whole adventure, so as to leave no community of interest remaining.

If the enterprise is not abandoned, and the property although separate from the rest, is still under the control of the master of the vessel and liable to be taken again on board for the purpose of prosecuting the voyage, the common interest remains and whatever is done for its protection is done at the common expense.

The cargo of a vessel being on fire the master transferred a quantity of specie to another ship which by his request convoyed him into a port of distress. He there incurred expenses in putting out the fire and repairing damages to the vessel, the specie being meantime deposited in a bank. The damages were found to be such that the cargo was sold and the voyage abandoned: *Held*, that the specie was liable in general average for the expenses at the port of distress.

APPEAL from the Superior Court of the city of New York. The action was against the defendant, as the owner of certain specie for its proportion on general average of losses, expenses and damages incurred by the vessel on which it was shipped and the rest of the cargo. Upon the trial these facts were

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proved: The ship Galena sailed from New Orleans for Havre, having on board a cargo of cotton, and \$30,853 in specie belonging to the defendant. On the afternoon of July 23d, 1853, the vessel was struck with lightning in the Gulf Stream, and was found to be on fire in the hold. After attempting to extinguish it by pouring on water and to stifle it by excluding air, a Danish vessel in sight was signalized and visited and the passengers and their baggage transferred to her, which was completed by 11 o'clock at night. The captain of the Galena then boarded the Danish vessel, and engaged her to keep company during the night, that if the fire was not extinguished he might board her again in the morning. The fire appeared to gain, and at daylight the captain concluded that he could not put it out and must make a port of distress. An arrangement was then made with the Danish captain by which he was to take the specie on board his vessel and accompany the Galena into Charleston. This was done because he had the passengers on board and as a protection to the crew in case they had to leave the ship if the fire burst out. The specie was transferred because if the fire broke out it might be too late to remove it from the Galena. Both vessels bore away for Charleston, which they reached on the 26th. The fire, meantime, did not appear to decrease. The fire engines of the city poured water into the Galena until she filled and sank to the upper deck. The cotton was covered with water and absorbed a good deal. Very little of it had been previously injured. The captain, after discovering at Charleston the extent of the damage to the ship and cargo, determined to abandon the voyage. He sold the cargo there and remitted the proceeds. While in the harbor and before reaching the wharf he got the specie from the Danish vessel and deposited it in bank.

The plaintiff had a verdict subject to the opinion of the court at general term. It was there determined that the specie was liable to contribute in general average to the amount paid for the services of the Danish brig, the expenses at Charleston in sinking and raising the vessel, repairs and damage to the cotton from the water, &c. Upon an adjustment the proportion due by the

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specie was found to be \$13,884, for which sum judgment was rendered for the plaintiff. The defendant having taken proper exceptions appealed to this court.

Charles O'Connor, for the appellant.

William M. Evarts, for the respondent.

SELDEN, J. No objection was made by the counsel upon the argument, to the principles upon which the general average was adjusted in this case, provided the specie was liable to contribute to such average for the expenses and loss which occurred after it was placed on board the Danish brig. Whether it was so liable, therefore, is the only question to be considered.

General average losses arise, either from voluntary sacrifices made, or extraordinary expenses incurred, for the joint benefit of the ship and cargo. The property which contributes, is that which is saved from the peril, together with that which is sacrificed for the preservation of the rest. The loss, however, does not in all cases fall upon the whole of this property. ARNOULD says: "All which is ultimately saved out of the whole adventure, *i. e.*, ship, freight and cargo, contributes to make good the general average loss, provided it had been actually *at risk* at the time such loss was incurred; but not otherwise, because, if not at risk at the time of the loss, it was not saved thereby." (2 Arnould on Ins., Perkins ed., § 338.) PHILLIPS uses similar language. He says: "Goods or any interest are not liable to contribute for any general average, or expenses incurred subsequently to their ceasing to be *at risk*." (2 Phillips on Ins., 3d ed., § 1407.)

The defendant's position here is that the specie, when once placed on board the Danish brig, being entirely secure from the peril which threatened the Galena and her cargo, was, under the rule laid down by ARNOULD and PHILLIPS, exempted from contribution for subsequent losses.

In determining this question, it will be necessary to recur to the principle upon which general average is based. That

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principle is, that where several persons are engaged in a joint enterprise, whatever is necessarily done for the common benefit ought to be done at the common expense. It is of the essence of this principle that it looks upon the enterprise as a whole, as an entirety. It is true, that in apportioning the loss, regard is had to the interest of the respective parties. But in other respects, no separate interest is recognized. Until, therefore, some portion of the property has been separated from the rest, so as no longer to have any interest in common with it, every risk which affects the enterprise as a whole must be regarded as affecting each portion of the property engaged.

Such a separation may, and frequently does occur, in the course of a voyage. For instance: in case of a jettison, the goods jettisoned do not contribute for any damage afterwards done to the residue of the cargo. If goods forming a portion of the cargo are sold for the necessities of the ship, or are delivered to the owner or consignee either before or after the arrival of the vessel at its port of destination, and before the occurrence of a general average loss, they do not contribute. So a separation may occur, through the withdrawal by the owner of a portion of the goods before the termination of the voyage. This every owner has, in general, a right to do, at any time, on paying the freight for the entire voyage, and the goods thus withdrawn are exempt from contribution for any subsequent loss, upon the principle that it is the goods at risk only which contribute.

If however, the case of *Bevan v. The United States Bank* (4 Whar.; 301), was correctly decided, this principle of exemption arising from the separation of a part of the cargo from the rest, is subject to a very important qualification. The vessel in that case was on a voyage from New Orleans to Philadelphia, and became stranded and ice-bound in Delaware Bay, but a short distance from her port of delivery. She had on board \$90,000 belonging to the defendants. It was necessary to discharge her cargo; and the specie was first removed, being taken on sleds to the shore, and delivered the next day to the defendants. Two months afterwards, the vessel reached Philadelphia

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in safety with the residue of her cargo, which had been discharged into lighters and afterwards re-shipped. During this interval a number of additional charges had been incurred for the safety of the vessel and the remainder of the cargo. The action was brought to recover the defendants' proportion of the general average loss; and the question was, whether they were liable for the expenses which had been incurred, after the specie had been delivered to them at Philadelphia. The court held that they were.

This case can only be reconciled with the general doctrine, in regard to the effect of the entire separation of one portion of the cargo from the rest, and from all the perils of the voyage, by adopting the distinction upon which a careful examination of the case will show the decision to rest, viz.: that although the delivery of a part of the cargo to its owner at any time before a peril has occurred, will discharge it from its liability to contribute for a subsequent loss; yet, that after such occurrence, and after measures to avert the peril, involving expense, have been commenced, there can be no such separation of any portion of the property from the residue as will exempt it from contribution for the entire loss.

Upon what is this distinction based? It is clear that general average does not rest upon any implied agreement among the several owners that their property shall abide the fate of the joint adventure, but upon the simple fact of a community of interest at the time of the loss. The whole doctrine that it is the property at risk only which contributes, is founded upon this theory. But the distinction referred to assumes that when a peril is once encountered, and some expense has been incurred to avert it, an obligation is imposed upon the various owners to abide the result of all the efforts and sacrifices required to avert that single peril, however remote may be its termination.

This obligation, if it exists, must have a foundation. It is rested by the court in that case mainly upon two grounds. The first is, that a rule which would exempt property which had escaped from the peril from liability to contribute to the expense incurred afterwards would be unjust; because it

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"would subject those whose goods are saved and delivered last to the payment of a portion of the expenses incurred in saving those of the first, without requiring the first to pay any part of the expenses incurred in saving the goods of the last," and would thus "operate partially and unequally, without imposing the obligation of *reciprocity*, which seems to lie at the foundation of general average."

Is this reasoning sound? The owner of the goods saved last contributes to the expense of saving the first, because that expense was incurred for his own benefit, and to save his own goods in common with those previously saved; but if the owner of goods once saved from the peril, pays for expenses or losses accruing afterwards, he pays for that from which he could not by possibility derive any benefit. It will be found difficult, I think, to sustain the doctrine upon this idea of reciprocity.

The second ground taken by the court in support of its decision, is, that the case is analogous to that of a partnership. KENNEDY, J., in giving the opinion of the court, says: "Now in the case before us it must be admitted that the property of the defendants, and that of the plaintiffs, formed, as it were, a *common stock* of a sea venture, held by them in their several proportions *as partners*, and that all were alike exposed to the same common danger from which the stock belonging to the defendants was saved, and a proportionable part of the expense incurred by saving it paid by the plaintiffs: and why shall the latter not receive from the former a proportionable part of the expense incurred in saving their portion of the stock from the same common danger?"

The analogy here suggested is more apparent than real. Partners are bound together by a compact which they are not at liberty to violate. Here there is no such mutual bond. The parties are brought together without preconcert or agreement of any kind. While the property remains connected, the owners have a common interest in the enterprise; but the tie which connects them being purely accidental, and not conventional, may be broken at will at any time by either of the parties.

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It is difficult to reconcile the decision referred to with that in the case of *Bedford Commercial Insurance Company v. Parker* (2 Pick., 1). In that case, the ship, bound to New Bedford, struck on a reef of rocks about nine miles from the town, and remained there in a situation of great peril. Her cargo was iron. While she lay upon the rocks, the defendants, who owned the iron, sent men on board and removed and saved a considerable portion of the cargo. The plaintiffs, who were the insurers, commenced their efforts to get the ship off before this iron was removed, but without success. They afterwards contracted with an individual to get the vessel off and take her to the town for a specified sum, which he did, she still having 155 tons of the iron on board. The action was brought to recover the defendants' proportion of this expense, and the question was, whether any portion of the cargo, and if any, what portion should contribute.

If the doctrine of the case just considered is sound, if the owners of the ship and cargo are to be regarded as partners engaged in a common enterprise, or if a just reciprocity requires that the owners of the property first saved should bear a portion of the expenses incurred in saving that which remains at risk, then, of course, all the iron in this case, as well that previously saved as that on board when the vessel was got off, should have contributed. But the court held that only the 155 tons on board when the expense was incurred was liable. PARKER, Ch. J., said: "The ship was suffered to be wrecked. The owners of the cargo *had a right* to save as much of it as they could, and ought not to be held to pay, on account of what was saved, any part of the expenses which subsequently occurred."

This decision, which has been uniformly approved, appears to me to be in strict accordance with the principles upon which the doctrine of general average rests. My conclusion, therefore, is, notwithstanding the case of *Bevan v. The United States Bank*, that if the owner of any portion of the cargo, even after a peril has occurred, and after a series of measures to avert it have been commenced, can succeed in so separating his own

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property from the rest that it is no longer in any sense at risk, he cannot be held liable to contribute to the expenses subsequently incurred. But in order rightly to apply this rule, it is necessary to ascertain the full scope of the term "at risk." Physical destruction, or direct physical injury to the ship or cargo itself, is not the only risk to which property so situated is exposed. Its value depends, or at least is supposed to depend, in some degree upon the successful prosecution of the voyage. Whatever threatens the voyage, therefore, is a peril to the entire property. Until that is broken up, unless the property claimed to be exempt is not only separated from the rest, and put in a place of present safety, but entirely disconnected with the enterprise, it must be regarded as still at risk, and liable to contribute. If the voyage is not abandoned, and the property, although separated from the rest and removed from the ship, is still under the control of the master, and liable to be taken again on board for the purpose of being carried to its destined port, the relations of the several owners are in no respect changed. The common interest remains; and whatever is done for the protection of that common interest, must be done at the common expense.

There are two English cases bearing directly upon this question, to which it may be well to refer. The first is that of *Job v. Langton* (6 Ellis and Black., 779). The barque Snowdon with a general cargo, sailed from Liverpool for St. Johns, Newfoundland, on the 20th March, 1855, and ran ashore the same night on the coast of Ireland. It became necessary to discharge the whole of the cargo in order to get the vessel off. After the cargo was discharged and placed in store at Dublin, she was got off at considerable cost, with the aid of a steam tug and by cutting a channel for the purpose. The steam tug did no work at the ship until after the cargo was landed. The vessel was towed to Liverpool to be repaired. In order not to lose a market at St. Johns, the cargo was forwarded from Dublin by another vessel; but it was stipulated that the case should be decided as if the Snowdon, after being repaired, had herself carried on the cargo. The question in the case was, whether

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the cargo should contribute to the expenses of getting the vessel off, as a general average.

Now it is plain, that if the position we have assumed is correct, viz., that so long as the voyage is kept on foot, and is not abandoned, whatever threatens to break it up, the whole cargo is to be considered at risk, whether in a situation to be physically injured by the peril or not, then of course the expenses of getting the *Snowdon* off, and towing her to Liverpool, must be regarded as chargeable to general average. The case was put upon this ground by Mr. Blackburn, who argued in support of the general average claim. He said: "The argument on the other side assumes, that in order to constitute general average, the whole must be saved from *physical* destruction; but it is enough, if it be a voluntary extraordinary sacrifice, *to save the adventure*." He admitted that if the adventure be abandoned, "the expenses incurred after the abandonment must be incurred for the articles separately, and cannot be brought into general average."

But the court held that the cargo was exempt from contribution for the expenses of getting the vessel off. It was conceded by Lord CAMPBELL, in giving his opinion, that the fact that the stranding was unavoidable, and not voluntary, did not affect the question. He said: "Although the stranding was fortuitous, all the expenses incurred from the misadventure, till all the cargo had been discharged, confessedly constituted general average." He, nevertheless, held that after the cargo was discharged and put in a place of safety, the subsequent expenses could not be said to be incurred for the joint benefit of the ship and cargo, inasmuch as the cargo was no longer at risk; thus rejecting the doctrine that a peril to the voyage is necessarily a peril to all the property concerned in it.

He was evidently, I think, led to adopt this conclusion by the circumstance that the cargo was actually carried to its destination by another ship. For, although he says, "of course we do not, contrary to the intention of the parties, attach any importance to the fact that the cargo was forwarded in another vessel," he nevertheless adds: "But in the absence of any

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statement to the contrary, *we might infer* (as the fact turned out to be) that there would be no difficulty in forwarding the cargo by another vessel." This last sentence furnishes the key to the decision; for no one can suppose that if the cargo had in reality been taken again on board the *Snowdon*, and carried to St. Johns, and the voyage had thus been actually saved to both ship and cargo, that the court would have refused to allow the expenses of getting the ship off, on the ground that the cargo might have been forwarded by some other vessel.

What the court would have done in that case, may, I think, be gathered from the subsequent case of *Moran v. Jones* (7 Ellis and Black., 528). The material facts in this case were, that the ship *Tribune*, chartered for a voyage to Peru and back, sailed from Liverpool on the 7th of July, 1856, and having encountered a storm, was on the same day forced to anchor near the entrance of that port. To relieve her, the foremast was cut away, but she drove ashore and became fixed upon the bank. On the 9th, assistance was procured from Liverpool, and the furniture of the ship, together with the goods on board, were sent in lighters to Liverpool. On the 14th a stream anchor was carried out. The ship was afterwards scuttled, and a portion of the ballast was thrown overboard, when, being kept free by pumping, she floated. She was then taken in tow by steamers, and taken back to Liverpool, where she was repaired; after which the goods were re-shipped, and she again set sail upon her voyage. The question in the case was, whether the owner of the goods was liable to contribute, by way of general average, to the expenses incurred in getting the ship off after the goods were safely landed and warehoused.

The court was now called upon to decide a case where the goods were actually re-shipped and forwarded by the same vessel. Here, as in the previous case of *Job v. Langton*, the goods were on shore and safely stored, and hence the expenses in question could not have been incurred for their benefit, except in view of their interest in the ultimate prosecution of the voyage. Mr. Blackburn, who was engaged in this as well as the previous case, argued here in opposition to the claim of

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general average. He pressed upon the court its decision in the former case, that expenses incurred to save the adventure were not to be considered as incurred for the benefit of goods previously taken on shore, although the voyage had not been abandoned. He said: "Here the goods were no longer endangered, though the *adventure* was. * * * * The adventure was as much in peril in *Job v. Langton* as here." But the court, notwithstanding this argument, held the goods liable to contribute, putting its decision, however, not upon the ground that the saving of the voyage was to be deemed a benefit to the goods as well as the ship, but upon the ground that the getting the ship off and towing her to Liverpool was a continuous operation, commenced before the goods were removed, and completed afterwards; and that this distinguished the case from that of *Job v. Langton*, in regard to which Lord CAMPBELL says: "In *Job v. Langton* we considered that the goods had been saved by a distinct and completed operation, and that afterwards a *new operation* began which could not be properly distinguished from the repairs done to the ship to enable her to pursue her voyage. The steam tug did no work at the ship, and does not appear to have been engaged until after the cargo was landed."

Now conceding this to be a valid distinction, it is difficult to find any foundation for it in the facts of the case. The goods were removed from the ship, and sent to Liverpool on the 9th of July. It does not appear that any effort was made to get the ship off until the 14th. The stream anchor was then carried out. The scuttling, the pumping, and the employment of the steamers to tow her to Liverpool, were all done afterwards. How, then, it can be said that the measures resorted to for the purpose of getting the vessel off constituted a "new operation," in the case of *Job v. Langton*, and not in this, it is not easy to perceive. Lord CAMPBELL refers to the case of *Bevan v. The United States Bank (supra)* as supporting the distinction he takes. That case, however, was not put upon any such ground, but as we have seen, partly upon a principle of reciprocal obligation, and partly upon a supposed analogy to a partnership.

The case of *Moran v. Jones* was, I think, rightly decided; but I cannot resist the conclusion that the idea of a continuous operation, commenced before and completed after the removal of the goods, was resorted to in order to reconcile the decision with that in the previous case of *Job v. Langton*.

These two English cases have been referred to thus particularly because they involved a principle of some commercial importance, and because they lie directly in our path in coming to a conclusion in the present case. But whatever may be the true interpretation of these cases, I nevertheless hold that although every owner of any portion of a cargo may, if he can, separate his property from the rest and from the whole adventure at any time, and thus avoid contributing to a subsequent loss; yet that such separation must be complete, and such as to have no community of interest remaining. If the enterprise is not abandoned, and the property, although separated from the rest, is still under the control of the master of the vessel, and liable to be taken again on board for the purpose of prosecuting the voyage, the relations of the several owners are in no respect changed. The common interest remains; and whatever is done for the protection of that common interest should be done at the common expense.

The result of these principles, when applied to the present case, is plain. It turns entirely upon the nature and object of the separation of the specie from the ship *Galena* and from the residue of the cargo, when it was placed on board of the Danish brig. I entertain no doubt that such a severance as would have exempted it from all liability to contribute to the subsequent expenses might have been effected by the master of the vessel in the same manner as by the owner himself, had he been present. The master is the agent and representative of each of the owners in respect to their several shares of the property under his charge, and has the same right which the owners themselves would have to take measures for its preservation.

If, therefore, the captain of the *Galena* had put the specie on board the brig, not in any event to be returned to him, but to

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be taken by the brig to its own port of destination, and the latter had then been suffered to pursue its course, the specie would clearly not have been subject to contribution for any subsequent expenditures to save the Galena. And notwithstanding the brig was employed to attend the Galena to Charleston, if it had been distinctly understood between the two commanders that the specie was committed entirely to the custody of the Danish captain, and was in no event to be restored to the care of the captain of the Galena, it would then also have been exempt.

But the facts do not warrant this assumption. The case states that "the specie was put on board the brig because it was safer there, as in case the fire broke out it might be too late to transfer it from the ship." The brig was to accompany the Galena to Charleston, and there is nothing from which it can be inferred that it was the intention of the captain of the latter to relinquish his control of the specie. The fact that he reclaimed and took it from the brig as soon as he arrived in Charleston, tends strongly to the opposite inference. It never ceased, therefore, up to that time, to constitute a part of the cargo of the Galena; and if the fire had been previously extinguished, and the voyage resumed, it would, of course, have been again taken on board and carried forward by her.

The case states, that while at Charleston the captain of the Galena determined to abandon the voyage. It follows, from what has been said, that up to that time the specie remained liable to contribute to the general average loss; and so the Supreme Court held.

The appeal taken by the plaintiffs, on the ground that freight should have been included in estimating the general average loss, cannot, I think, be sustained.

The judgment of the Supreme Court should be affirmed.

DENIO, DAVIES, WRIGHT, BACON and WELLES, Js., concurred.

COMSTOCK, Ch. J. (Dissenting.) When the vessel was set on fire by lightning, the lives of the passengers and the safety of

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the ship and entire cargo were endangered. The employment of the Danish vessel as convoy to attend the Galena into the port of Charleston was, therefore, a measure demanded by the common peril. The expense of that employment was consequently a loss to be borne by the owners of the ship and the various owners of the cargo, according to the principles of general average. Very plainly the specie, if it had not been removed, would be bound to contribute to this expense equally with the residue of the cargo, and quite as plainly its removal to the Danish vessel, which was a place of safety, did not relieve it from that liability.

But when the specie was once removed it became separated from the common peril, and the question is whether it was liable for losses and expenditures afterwards incurred in saving the ship and cargo which remained on board. The loss and expense were mainly incurred in the port of Charleston, where the vessel was filled with water in order to extinguish the fire. By that proceeding the ship and the cotton on board sustained a very serious damage. The specie had been landed from the Danish brig and was not involved in the peril.

All the authorities agree in the statement of the general rule on this subject. That rule is that where expenses are incurred or sacrifices made voluntarily for the safety of ship, freight and cargo, a general average will take place provided the purpose of the sacrifice or expense is accomplished. (3 Kent, 232; 2 Arnould on Ins., 876, 877; Phillips on Ins., 331, 334.) This doctrine is founded on a plain principle of natural equity, but the terms in which it is universally stated certainly do not include a case like the present one. Beyond the employment of the Danish vessel, no act was done or expense incurred, having anything to do with the safety of the specie. The ship and the remaining cargo were saved by the subsequent proceedings, and according to natural justice they should bear the losses incurred.

It is claimed, however, that where a peril occurs, no part of the cargo can be withdrawn or separated from it so as to be relieved from contribution for all the sacrifices made and ex-

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penses incurred at any time before the peril is entirely past. The owner of the ship and all the owners of a cargo are bound, it is said, by a compact or agreement with each other which prevents any one of them from relieving his own property from the common danger so as to exempt it from the losses which may afterwards happen to others in saving theirs from the same danger. But there is no such compact or agreement. There is no agreement at all on the subject. The principles of justice on which general average is founded may lead to such a result in many circumstances. The peril may be of such a nature that the only chance of safety for both ship and cargo is the transfer of the latter to lighters in the vicinity of a harbor or to a convoy at sea. The safety of different portions of the goods and of the vessel may thus be insured at different points of time during the peril. But the master representing all interests must be impartial to all. He cannot in such a case, exempt the property of one owner from entire contribution by selecting it from the mass and placing it first in a situation of safety. (*Bevan v. The United States Bank*, 4 Whar., 301, 308.) The aggregate expense of providing for the safety of all interests must be borne according to the value of each. A different doctrine would lead to a conflict of rights and interests, and give to the master the arbitrary power of protecting one at the expense of another.

But suppose a ship takes fire, having on board a cargo which can only be saved by extinguishing the flames as quickly as possible. There is, however, a box of jewelry or a quantity of gold dust of ten times greater value than the cotton or lumber with which the vessel is loaded. The heavy freight must abide the fate of the vessel because there is no other means of saving it. The jewelry or the gold may be placed out of the danger by transferring it to another vessel in sight. The duty of the master in such a case is plainly to hail the ship and make the transfer. In such a case there is not, in a just sense, a community of peril. The property incapable of removal is subject to whatever of danger is occasioned by the fire. The gold is not involved in that peril because it can be put in safety by remo-

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val. In such a case, must there be a community of loss? It seems to me not. If the assistance of the friendly vessel is required only to take care of the value transferred to it, the charge in the nature of salvage should rest upon that value alone, while on the other hand there should be no contribution in favor of the vessel in distress and her remaining cargo for losses wholly unconnected with the safety of the article transferred. The owner of the gold may be himself on board. The proximity of another vessel is to him absolute exemption from the peril to his property, while to others it only offers the certainty of saving life. The circumstances, all considered, do not involve his interest in the danger. Why then should they involve him in the losses incurred in averting the danger? If the owner being present could thus separate himself from the peril by seizing a means of safety peculiar to his own interest, the same effect must be given to the act of the master who represents him.

The question can be placed in a still stronger light. Suppose a vessel having reached her port of destination takes fire before the landing of the cargo. The heavy freights are incapable of immediate removal, and in order to save it as well as the vessel the fire must be extinguished. But the specie on board can be landed and thus separated from the peril. It may well happen, indeed, that specie is the only freight. In such an exigency may not the consignee extricate his property from the impending danger without liability to contribute for the loss or damage of the ship. The doctrine of general average requires contribution for sacrifices made to avert a common danger. Where there is no community of peril there is none in the loss. In the case supposed it may be necessary to scuttle the ship or submerge it with water by the aid of fire engines. Great damage may thus ensue to the freights which cannot be moved, if there be any such, and to the vessel itself. The interests which are protected by the measures taken, and those only, should, on principles of equity, bear the losses.

In the present case the fire began at sea, but it was extinguished in the port of Charleston by the employment of fire

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companies, which filled the vessel with water. The sacrifices and expenditures were: 1. The compensation paid to the fire companies; 2. The injury to the vessel; 3. The injury to the cotton on board which could not be separated from the danger. But the specie was landed and the measures taken to protect the ship and cotton had nothing to do with its safety. It may be of no special importance that the specie had been previously transferred to the Danish brig. The brig was in the service of the vessel exposed to the peril. But both vessels were in port and the specie could be landed from either. Charleston was not, it is true, the port of destination, but it was the port of necessity where the voyage was broken up and abandoned. The owners of the specie were entitled to receive it at that place without contribution for sacrifices and expenses to which the ship and the cotton were exposed, but from which their property was exempt.

I am of opinion, therefore, that the judgment should be reversed and a new trial granted.

CLERKE, J., also dissented.

Judgment affirmed.

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MYGATT v. NEW YORK PROTECTION INSURANCE COMPANY.

A company, organized under the general act (ch. 308 of 1849) to insure on the plan of mutual insurance, has power to issue policies upon the payment of a fixed premium, without provision for any contingent liability of the insured.

The act makes all parties insured members of the corporation, and entitled to share in its profits of its business. The contingent benefit thus secured by taking out a policy for a cash premium, is sufficient to constitute the insured an insurer to the extent of his interest, and to bring the transaction within the principle of mutuality.

APPEAL from the Supreme Court. Action upon a policy of insurance against fire. The trial was before a referee, who

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found all the facts necessary to charge the defendant if it had authority to make the contract, which was in consideration of the payment of a definite cash premium without any provision for further contribution or liability on the part of the insured. The defendant was organized under the general act of 1849, to provide for the incorporation of insurance companies. Its charter declared that it was formed to make insurance against fire, and against the risks of inland navigation, as provided in the second subdivision of the first section of the aforesaid act. "Its business shall be conducted on the plan of mutual insurance, and it shall possess all the powers conferred by said act, and which now are or hereafter may be conferred by law upon an incorporated company, formed under said act for the purpose aforesaid, *whose business is to be conducted on the plan aforesaid.*" The charter further provided, that the directors should "be elected by the persons holding policies of insurance in this company, or their proxies, and one vote shall be allowed for every one hundred dollars insured. * * * * The rates of insurance shall be from time to time fixed and regulated by the company, and premium notes therefor shall be received from the insured, which shall be paid at such time or times, and in such sum or sums, as the corporation shall from time to time require. *Any person applying for insurance*, so electing, may pay a definite sum of money, to be fixed by said corporation, in full for said insurance, and in lieu of a premium note."

The fifth by-law of the company provided that all insurance risks taken by it should be divided into two classes; "the first class, to be denominated *country insurance*, shall consist of all policies the premiums of which are secured by note on which the rate of premium charged does not exceed one-half of one per cent of the amount insured calculated at the cash rates. Ten per cent when what are termed the large notes are used, and two and one-half per cent when the small notes are used (reference being had to the notes used mostly up to January 1, 1850), shall be deemed equal to one-half of one per cent."

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The other class was to include all other policies, including those the premium on which was paid in cash. The by-law further provided that the premium notes of each class should only be assessed for the payment of losses in the class to which they belonged.

The referee decided that the defendant could only issue policies of insurance based upon premium notes, or some contract by which the insured became a member of the company and a participator in its risks and liabilities; that it had no right to issue policies of insurance for a cash premium in lieu of premium notes, and without any contract of mutuality on the part of the insured. He held the policy in question void, and judgment was rendered upon his report in favor of the defendant. The judgment was affirmed at general term in the fifth district, and the plaintiff appealed to this court.

Henry R. Mygatt, for the appellant.

Francis Kernan, for the respondent.

SELDEN, J. The defence which prevailed at the trial, and which is relied upon here, is, that the defendants having been organized as a mutual company, had no authority to issue policies for premiums to be paid in cash, and consequently that their act in issuing the policy in question was *ultra vires*, and the policy void.

I shall assume, for the purposes of this case, that the defendants can avail themselves of this defence, and that they are in no manner estopped from insisting upon their own want of power. The question then is, did the defendants exceed their corporate powers by issuing this policy and receiving the premium upon it?

The charter adopted by the defendants, which was introduced and proved upon the trial, contained the following clause: "Any person applying for insurance, so electing, may pay a definite sum in money, to be fixed by said corporation, in full for said insurance, and in lieu of a premium note." The policy

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in question here was issued in strict accordance with this provision. The defendants, therefore, to sustain their defence, must show that the company had no authority to insert such a clause in its charter; and this depends entirely upon the provisions of the act of 1849, under which the company was organized.

By section 8 of that act, it is enacted that persons intending to become incorporated under it, "shall file in the office of the Secretary of State a declaration, signed by all the corporators, expressing their intention to form a company for the purpose of transacting the business of insurance, as expressed in the several subdivisions of the first section of this act, which declaration shall also comprise a copy of the charter proposed to be adopted by them;" and section 10 provides that "it shall be the duty of the corporators of any and every company organized under this act, to declare in the charter, which is herein required to be filed, the mode and manner in which the corporate powers given under and by virtue of this act are to be exercised."

These provisions confer upon the companies organized under the act a broad and unrestricted power to prescribe for themselves the manner in which they will conduct the business of insurance. They virtually transfer to these companies full legislative control over the subject and, construed by themselves, would invest each company, whether joint stock or mutual, with power to provide for every kind of insurance authorized by the act. The only express limitation upon this power is contained in section 11, which requires that the charter "shall be examined by the Attorney-General," who, if he finds it "to be in accordance with the requirements" of the act, "and not inconsistent with the Constitution or laws of this State," is to "certify the same to the Comptroller," &c. It cannot be pretended that the clause in the defendants' charter, under which this policy was issued, is in any manner repugnant either to the Constitution or the general laws of the State. The only question, therefore, is, whether it is in conflict with anything contained in the act of 1849 itself. Unless the defendants can find

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something in that act which prohibits companies organized as mutual companies from receiving their premiums in cash, they cannot maintain their defence.

There is clearly nothing in the terms of the act which contains such a prohibition. But the restriction is sought to be deduced by implication from those provisions of the act which discriminate between joint stock and mutual companies. It is based mainly upon sections 3, 4 and 5. The charter, which persons wishing to become incorporated are required by section 3 to file, is, as we have seen, to prescribe "the mode and manner" in which their "corporate powers" are to be exercised. Section 4 authorizes the company, after filing such charter, "to open books for subscription to the capital stock of the company," * * * "or in case the business of such company is proposed to be conducted on the plan of mutual insurance, then to open books to receive propositions," &c. It is there provided (§ 5) that no "joint stock company" shall be organized in the city of New York, or the county of Kings, with a smaller capital than \$150,000, or in any other county, with a smaller capital than \$50,000; and that no company formed for the purpose of doing business "on the plan of mutual insurance," in either of the counties of New York or Kings, shall commence the business of fire or inland navigation insurance, until agreements have been entered into for insurance, with at least one hundred applicants, the premiums on which shall amount to \$200,000, nor in any other county, until such premiums shall amount to \$100,000, for which premium notes are to be taken "in advance" as a "part of the capital stock" of the company.

Now the argument on the part of the defendants is, that there having been in this State, previous to the act of 1849, two distinct and well known classes of insurance companies, viz., joint stock and mutual companies, organized upon different principles, and transacting their business in different modes, it was the evident design of the Legislature, as evinced by the provisions to which I have referred, to keep these two classes of companies entirely distinct, and to prevent any intermingling

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of the two modes of insurance in the same company: that insuring for a specific premium, payable in cash, is the appropriate business of a joint stock company organized with a view to profit upon its capital, the corporators in which consist, not of the persons holding policies, but of the owners of this capital: that a mutual insurance company is composed exclusively of the persons insured, and is organized by its members, not with a view to profit, but for the sole purpose of mutually insuring each other: that it is essential to such a company that every person insured should be a member of the company, and an insurer of all the other members, as well as insured by them: and that one who pays the premium upon his policy in cash, and is liable for nothing more, does not become a member of the company, and is in no sense an insurer of others holding its policies: that there is no mutuality, therefore, between such a person and those who have given premium notes liable to be assessed for future losses; and hence that issuing policies for cash premiums is a departure from the legitimate business of a mutual insurance company, and subversive of that distinction between joint stock and mutual companies which it was the design of the Legislature to preserve.

This argument, it will be seen, consists of two branches, viz.: First, of that construction of the act of 1849 which holds that a strict line of demarcation was intended to be drawn between the two classes of companies, and that when a company had once made its election to organise, either as a joint stock or a mutual company, it was the object of the act that it should be ever thereafter rigidly confined to that mode of insurance which is appropriate to its class; and secondly, of the assumption that there is something in the taking of a specific cash premium in full for insurance, without further liability on the part of the insured, which is repugnant to the nature and principles of a mutual insurance company. The defendants are under the necessity of maintaining both these propositions. If they fail in respect to either, they fail in their defence. If evidence of that inflexible determination to keep the two kinds of companies entirely distinct, for which the defendants con-

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tend, is not to be found in the act; or if the taking of a cash premium in full for the insurance can be reconciled with the "mutual principle," as it is called, then, of course, there is no objection to this policy.

Let us examine these two points separately. On what does the assumption of such a determination on the part of the Legislature rest? There is clearly no good reason why the Legislature should have provided for so rigid a separation of the two species of insurance companies. That it was never supposed there was any ground of policy which required that mutual insurance companies should be prohibited from receiving cash premiums, is conclusively shown by the course of legislation on the subject. Acts have been repeatedly passed, conferring upon such companies this power, in the precise terms used by the defendants in their charter. It was conferred upon the Albany County Mutual Insurance Company in 1848; upon the Herkimer County Company in 1850, and upon various other companies in subsequent years. The Legislature seems to have been ever ready, upon request, to authorize these companies to receive their premiums in cash, instead of premium notes.

There is no public reason why such a company, when it has once acquired a substantial basis for its business, should be rigidly confined to the mutual system. That system was not devised by the Legislature for the protection of the public, but by individuals for their private benefit. It does not rest upon any foundation of public policy. Why, then, should the Legislature, when enacting a general law, providing for the organization of all insurance companies, so adjust its provisions as to inhibit mutual companies from transacting any portion of their business in a manner which has so often received the legislative sanction? The very object of the law being to prevent the necessity of repeated applications to the Legislature, by those desirous of engaging in the business of insurance, we should naturally expect its provisions to be so framed as to enable mutual companies, under proper guards and restrictions, to avail themselves of that privilege which the Legislature has

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shown itself in so many instances ready to confer. A contrary intent ought certainly to be made very clearly to appear before its existence is assumed.

The question, then, upon this point, is, whether those provisions of the act of 1849, already referred to, discriminating to some extent between joint stock and mutual companies, exhibit an implied intention to prohibit mutual companies from issuing cash policies. It is indispensable for the defendants to maintain the affirmative of this; because, as the power of the companies, under section 10, to frame their own charters, is conferred in unrestricted terms, they may, of course, provide for this class of business, unless the limitation of this power upon which the defendants insist, is elsewhere found; and there is no portion of the act, other than that referred to, from which such limitation can by possibility be deduced.

But the discrimination in sections 4 and 5, between the two classes of companies, had another obvious purpose, which was fully answered when the respective companies were once organized and ready to commence their operations. The main reliance of all insurance companies for the payment of losses, after becoming once fairly established, is upon the sums received for premiums. But losses may occur before their accumulations from this source are sufficient to meet them. For this reason it was deemed wise and prudent on the part of the Legislature to provide that every insurance company, whether joint stock or mutual, should have at the outset a fund sufficient to meet its early losses; and as mutual companies have not, like joint stock companies, a cash capital, it became necessary, in arranging the provisions on this subject, to discriminate between the two.

That this was the sole object of the discrimination in question, to me seems plain. Sections 4 and 5 relate to this preliminary fund, and to nothing else. They require a joint stock company in the country, before commencing business, to have a cash capital of \$50,000, and a mutual company a capital of \$100,000, composed of promissory notes given in advance for premiums. These notes would represent risks incurred or to be incurred, while the cash capital would not; and hence the dif-

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ference in amount. The Legislature evidently considered the \$100,000 in notes equivalent to \$50,000 in cash. What reason can there be, after the companies are once formed with such a preliminary fund, pronounced adequate by the Legislature, why a mutual company should not, as well as a joint stock company, if it chooses to incur the risk, issue cash policies. The public and all those who deal with the company have the same security in the one case as in the other. They have the same preliminary fund, and the same accumulations from the premiums received. The question of receiving cash premiums in full for policies, after a company has once obtained a sufficient capital to justify it in commencing business, is a question for the consideration, not of the Legislature or the public but of the corporators themselves. The public have no special interest in it. The premiums received, if graduated upon just and proper principles, will strengthen one of these companies to precisely the same extent as the other, and will afford the same additional guaranty to parties insured for the payment of losses.

We see, therefore, very plainly, why every mutual company once established, which has asked of the Legislature the favor, has obtained the power to issue cash policies; and we can hardly fail also to see that when the Legislature, in the act of 1849, had provided that all mutual companies should have a sufficient fund upon which to begin their operations, they might safely be allowed, as by section 10 they are allowed, to prescribe for themselves the mode and manner in which they would conduct their business. This construction gives full force and effect to every provision of the act of 1849, and exempts the Legislature from the imputation of having so framed a statute, designed expressly to render such applications unnecessary, as to require in every instance a special application for a favor which reason and the practice of the State alike show it would be a matter of course to grant.

But this is not all. The statute bears upon its face unequivocal evidence that the Legislature did not intend to erect an impassable partition wall between the two kinds of companies.

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Section 21 provides as follows: "It shall be lawful for any mutual company, established in conformity with the provisions of the 4th section of this act, to unite a cash capital to any extent as an additional security to the members, over and above their premiums and stock notes, which additional cash capital shall be left open for accumulation, and shall be loaned and invested, as provided in the 8th section of this act, and the company may allow an interest on such cash capital, and a *participation in its profits*, and prescribe the liability of the owner or owners thereof to share in the losses of the company; and such cash capital shall be liable as the *capital stock* of the company in the payment of its debts."

It has been suggested that this is a mere authority to borrow money. But this idea can hardly be reconciled with the provisions of the section. If the contributors of the additional fund are "to participate in the *profits*" of the business, and if the fund itself is "liable as the *capital stock* of the company" to the payment of its debts, then such contributors are to all intents and purposes partners in the company, and not its creditors. The section authorizes the company "to prescribe the liability of the *owner or owners*" of the additional capital to share in the losses of the company. But if the money is borrowed, it would belong to the company itself and not to the contributors, as this provision plainly contemplates. Again, the fund is to be "kept open for accumulation." This cannot mean that the company shall continue to borrow. It can only mean that additions may be made from time to time to the subscribed capital, it being assumed that every such addition would strengthen the company. The whole section exhibits an intent that those who contribute the additional capital should be associates in and not creditors of the company; and any other supposition is inconsistent with its language and structure.

It is true, as has been said, that no such cash capital was added by the defendants to the funds of this corporation. But the section has, nevertheless, a most important bearing upon that which is made the turning point in the present case. The

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whole argument, on the part of the defendants, rests upon the assumption that an intent is to be gathered by implication from the general act of 1849, that there should be no intermingling of the two modes of insurance, in the same company. Now, section 21 conclusively proves the contrary. It shows even a solicitude on the part of the Legislature, by providing that the additional fund shall be left open for accumulation, to add the stock feature, and of course the system of cash premiums, to the mutual companies.

That the Legislature contemplated the issuing of cash policies to some extent by all mutual insurance companies, is evident from the very sections upon which the argument on the part of the defendants is mainly based. The notes provided for in section 5, which constitute the capital upon which a mutual company is to commence their business, are not premium notes, to be assessed when losses occur; but are payable absolutely, irrespective of all losses; and so it was held by this court in the case of *White v. Haight* (16 N. Y., 310). They are the same, therefore, as so much money advanced to the company for premiums upon policies thereafter to be issued. The idea of these notes was evidently borrowed from the charters of a class of mutual insurance companies, of which the Atlantic Mutual, chartered in 1842, was the type. Section 12 of the charter of that company provides that "the company, for the better security of its dealers, may receive notes for premiums *in advance*, of persons intending to receive its policies; and may negotiate such notes for the purpose of paying claims or otherwise, in the course of its business." This was the first appearance in our statutes of this mode of obtaining a preliminary fund upon which to commence its business by a mutual insurance company, and it was adopted by the Legislature in enacting the general law of 1849. The charter of the Atlantic Mutual clearly contemplated the re-payment of those advances by the issuing of cash policies, because no provision was made for the issuing by that company of any other; and it is very clear that the same mode of re-payment must have been contemplated, under the general law.

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My conclusion, therefore, would be that if the policy in question is to be regarded as issued to a mere outside party, without any reference in itself to the principles of mutuality, it would nevertheless be valid and binding.

If, however, we assume the contrary, and suppose it to be indispensable that the mutual principle, as it is called, should be observed in all the policies issued by a mutual company, the result, I think, would not be different.

It is somewhat difficult to ascertain with precision in what this mutual principle, so strenuously contended for, is claimed to consist; as mutual companies have assumed a great variety of forms. But I will suppose, for the purposes of this case, that it involves all the requirements suggested on the part of the defendants. The most prominent among the requisites insisted upon as constituting a mutual insurance is, that the party who is insured should thereby be brought into mutual relation with the insurers by becoming a member of the company issuing the policy. It seems to be supposed that this was not the case with the party to whom the policy in question here was issued. An examination, however, of the charter of the company will clearly show the contrary. Article 5, among other things, provides as follows: "The directors shall be elected by the persons holding policies of insurance in this company, or their proxies, and one vote shall be allowed on every \$100 insured." Thus, every person holding a policy issued by the company is made a member of the corporation, and entitled to a vote therein, entirely irrespective of the question whether the premium upon such policy was paid in money or by a premium note; and his interest is measured upon a principle which is perfectly equal and just, viz.: by the aggregate amount insured.

If it be said that mutuality also requires that there should be some sort of ratable equality between those who pay their premiums in cash and those who give notes, this is easily attained. When the present value of a life annuity, or of a right of dower, is estimated upon principles which experience has established, the sum arrived at is, in the eye of the law, just

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equal to the contingent interest which it represents. So, when the chances of liability upon a premium note are calculated upon principles similar, if not as exact, a sum is found which may be regarded as equivalent to the contingent liability upon the note. Indeed, all premiums for insurance are calculated upon this principle. That equality may thus be produced, is conceded; but two answers are suggested. In the first place, it is said that it is not shown that the premium in this case was the result of any such calculation; and that the presumption is, that it was not. Now, I am unable to see upon what foundation such a presumption can rest. I have supposed that, where a transaction would be legal if done in one way, and illegal if done in another, and there was no evidence on the subject, it was to be presumed to have been done according to law. Here, however, a presumption is to be raised in favor of this company, that it was guilty of a violation of law, to enable it to escape from the obligation of a contract, the consideration for which it has received and still retains. In my opinion the presumption is directly opposite to that thus suggested. It was not necessary that anything should appear in the charter or by-laws on this subject. It was a matter of calculation to be adjusted upon fixing the premium.

The provision in the charter, however, as it seems to me, does imply that the premium was to be calculated upon the precise principle which has been here suggested. The cash premium was to be "in lieu of," that is, was to take the place of a premium note. This implies, that it was to be made equal to such note, which for all substantial purposes it would be if calculated in the mode here pointed out.

The other answer given to this view of the case is, that the principles of mutual insurance require that every person insured upon that plan should be also himself an insurer; that is, that each person insured must also be an insurer of all his associates, as well as insured by them; and it is said that an insured person who has paid a premium of a definite sum, in the language of the defendants' charter, "*in full* for said insurance," and who, therefore, is not responsible for anything more,

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cannot be a mutual insurer, because he is not in any sense an insurer at all. This argument is based upon what I regard as an erroneous view of the true distinction between a mutual and a joint stock company.

Indeed, much of the difficulty on the subject has been produced by attaching a meaning to the word mutual, in its connection with insurance, which does not belong to it. A mutual insurance company is simply a company whose fund for the payment of losses and expenses consists not of a capital subscribed or furnished by outside parties, but of premiums mutually contributed by the parties insured. ANGELL says: "A mutual insurance in its origin, was a body of persons, each of whom was desirous of effecting an insurance; and he agreed with the rest of the members to contribute the premiums to a common fund, *on the terms* that he should be entitled to receive out of that fund." (Angell on Fire and Life Insurance, § 413.) There is not a word about the parties being insurers of each other, further than as they were made so by the payment of a cash premium. They made up a common fund by means of their common or mutual contributions, upon which each had a claim for any loss in respect to the property insured. There was no responsibility beyond that, and this is all that is essential to a mutual company. The "mutual principle," as it is called, requires nothing more. Joint stock companies have a subscribed capital. Mutual companies do not, but depend upon their premiums. This is what distinguishes them; and whether the premiums are paid in cash or by notes has nothing to do with the distinction.

Granting it, however, to be necessary that all those who are insured in a mutual company should also be insurers; the person who took this policy was so. He became, as has been shown, a member of the company, and interested in its funds in proportion to the amount of his policy; and to the extent of that interest he was an insurer of all other members.

It is no answer to this to say that mutual companies contemplate only indemnity against loss, and not the accumulation of a fund to be divided among the incorporators. This depends

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upon the manner in which they conduct their business. There is nothing to prevent a mutual company from carrying on its operations with a view to profit and dividends. Indeed, the act of 1849 plainly contemplates that they will, or at least that they may do so when it provides, in section 21, that they may allow to parties contributing a cash capital a "participation in their (its) profits."

But were this question not as clear upon principle as I think it is, it may be regarded as settled by authority. What is claimed on the part of the defendants is, that issuing policies for premiums payable in money is not appropriate business for a mutual insurance company, or at all events for one which also takes premium notes subject to assessment; that it assimilates such company to a joint stock company, which the act of 1849 does not permit; and that there is a want of mutuality between those paying cash premiums and those who give notes.

These same questions received the deliberate examination of the Supreme Court of Ohio, in the case of *The Ohio Mutual Insurance Company v. Marietta Woolen Factory* (3 Ohio State R., N. S., 348.) The company in that case was incorporated in 1848. In 1844, an act was passed to amend the charter, which contained two sections. Section 1 provided, in almost the same terms with the provision in the defendants' charter, that any person applying for insurance might elect to pay "a certain definite sum of money *in full* for such insurance," which sum was to be "in lieu and place of a premium note." Section 2 devoted the funds arising from cash premiums and the premium notes, in general terms, to the payment of losses and expenses, saying nothing about assessments, but required the cash fund to be first exhausted. The directors there took ground precisely analogous to that taken here, viz.: that this change in the business of the company changed its character from "a purely mutual company" to what they called "a mutual stock company." Hence they disregarded the provisions in their charter, which subject the premium notes to contribution for such losses only as should accrue while the

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makers were members of the company; and treated the cash premiums and premium notes as joint capital, subject to be applied indiscriminately to all losses, except that the cash premiums were to be first exhausted. RANNEY, J., after stating this conclusion of the directors, said: "In this we think they were *most clearly* wrong. No such radical change is or was intended to be effected by this act. It was still a mutual insurance company, with no power in the directors to control its assets as an independent company, or to divert them from the purposes to which the law and the contract of the parties had appropriated them. Every person insuring, whether by the payment of a cash premium, or the deposit of a premium note, *still became a member of the company*, and this act simply gave the election to him whether he would become a member in the one way or the other." Again he says: The cash premium belongs precisely where the premium notes, whose place it takes, would belong; and is subject to the same appropriation, with this modification; it must be first applied, and no part of it can be withdrawn upon the expiration of the policy, although it should not have been all expended. * * * * *There is no difficulty in the practical working of this construction.*"

This case decides every point raised by the defendants here; because, although there the taking of cash premiums was authorized directly by the Legislature, yet if this did not change the character of the company; if it was "still a mutual insurance company;" if those who paid cash premiums became "members of the company;" and the premium paid took the place of a premium note; and if there is no practical difficulty in the working of such a system, then there can be no objection to the adoption by the defendants of the clause in their charter which authorized it.

But the question under our own statute, and in precisely such a case as that now before us, has been passed upon by the Supreme Court of the United States in the case of the *Union Insurance Company v. Hoge* (21 How. U. S. R., 35). The company in that case was incorporated in this State under the law of 1849, and its charter was identical with that of the de-

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endants here. The action was brought upon a policy, the premium upon which had been paid in money. The case appears to have been elaborately argued, and among the objections made by the counsel for the company to the issuing of cash policies, is the following: "That it destroys the principle of *mutuality* which is the leading characteristic of mutual companies, formed under the law of 1849, and confounds the operation of a company organized to do business on the mutual plan, with that of those companies which are organized on the plan of stock companies, and which are in their nature and principles antagonistic to the mutual companies." On this point the court, by NELSON, J., say: "It is argued, however, that the company in question is a mutual insurance company, as declared by the act; that according to this system the insured must be a member of it, and that a person insured upon a cash premium, without any further liability, cannot be a member. *This argument is not well founded* either upon principle or authority. Admitting that the insured must be a member of the company, he is made so by the payment of the cash premium. The theory of a mutual insurance company is, that the premiums paid by each member for the insurance of his property *constitute* a common fund, devoted to the payment of any losses that may occur. Now the cash premium may as well represent the insured, in the common fund, as the premium note; and this class of companies has been so long engaged in the business of insurance it may well be that they can determine, with sufficient certainty for all practical purposes, the just difference in the rates of premium between cash and notes. These mutual companies, possessing the authority contained in the 8th section of this charter, viz., to take cash premiums or premium notes, are at the present day in operation in several of the States, and it has never been supposed that the mutual principle has been thereby abrogated."

I have quoted thus largely from the opinion of Judge NELSON, because in my view the extract given answers so fully to every phase of the argument for the defendant here that there is but little necessity for saying more. When it is considered

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that the term "mutual," as applied to an insurance company does not import any peculiar and exact method of producing mutuality in the sense of equality among its members, but that it is simply significant of an association for the purposes of insurance, whose fund for the payment of losses consists, not of a capital furnished by uninsured parties, but of the premiums mutually contributed by the persons insured, all difficulty on the subject is at an end. That such is the import of the term appears not only from the opinion of Judge NELSON, but from all the other authorities on the subject.

The judgment in this case, should, I think, be reversed, and there should be a new trial, with costs to abide the result.

DENIO, J. (Dissenting.) It is conceded that the defendants were incorporated under the general act of 1849, as a mutual insurance company; and that the contract of insurance, upon which a recovery is claimed, was executed for the cash consideration of \$9.81 only, and without any engagement on the part of the assured to be further liable upon any event or contingency whatever; and that the amount insured was the sum of \$872. The insured was not in any event to have any interest in the money thus paid by him, or in any premiums paid by any other parties effecting insurance with the company. The contract was an undertaking by the defendants, in consideration of the money thus paid, to indemnify him against loss by fire, and nothing more.

The defendants were authorized to make contracts of insurance "on the plan of mutual insurance." (Act of 1849, ch. 308, §§ 4, 5.) And in addition to the powers necessary to transact that business, including such as might be incidental to it, they did not possess and could not exercise any other powers. (2 R. S., 600, § 3.)

The general act carefully distinguishes between what it denominates the plan of mutual insurance, and the business of insurance generally. It authorizes the formation of two classes of insurance corporations, founded wholly upon that distinction, requiring from those which are not upon the plan of mu-

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tual insurance a capital actually paid, to the amount of at least \$50,000, which is to be invested in public stocks and bonds and mortgages, while those which are organized upon the mutual plan are not obliged to furnish any actual capital, but may commence business when they have received applications for insurance to a certain amount and have taken notes for the unearned premiums in advance. (§§ 5, 8, 11.) The act denominates the corporations of the former class stock companies, and the others mutual companies. (§ 11.)

Upon these positions there can be no controversy whatever; and the single question in this case is, whether the contract upon which this action is brought was entered into between the defendants and the insured party in transacting a business of mutual insurance. If it was, the contract is lawful; otherwise it is illegal and void.

What then, is the meaning of mutual insurance, and how does it differ from the business of insurance when carried on by joint stock companies or individual underwriters? The words import the existence of reciprocal relations among the persons engaged in the business, and that each acts in return or in correspondence with the others. Where they are applied to the business of insurance they import that the parties concerned are each insured parties, and that at the same time each are insurers of the others. We should gather this idea from the language if there were no known examples of such a practice to which we might suppose that the Legislature had reference. But every business man, whether lawyer or layman, immediately associates with the words a method of conducting the business of insurance well known in this country and to a less extent among most of the civilized and commercial nations of the world. By looking into the books we find that a mutual insurance company is an association of persons each of whom is desirous of insuring his property, and who agree with each other to contribute their premiums to a common fund on the terms that each shall be entitled, in case of loss, to an indemnity out of that fund. (Angell on Life and Fire Insurance, § 413; Arnould on Insurance, 85; *Strong v. Harvey*, 3 Bing.

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304.) It is of course the same thing if, in lieu of a fund, the parties to the mutual enterprise give written guarantees to be responsible for losses, in the proportion of their interest as insured parties, in the form of premium notes. All that is material to the idea of mutual insurance is, that each of the parties should sustain the relation of an insured party and of an insurer of each of the others. Now the business of insurance where the mutual principle does not obtain is quite a different thing. When conducted by a joint stock company or by a corporation, which is now the most usual method, it consists in the contribution of a capital, the proprietors of which guarantee the full payment of insurance to the policy holders, but retain the entire profits of the business. The assured has no interest in the premiums; they become the property of the insurers as the price of the insurance, and they are at liberty to apply them in what manner they think proper. Enough has been said to show that the two classes of institutions cannot be confounded without an entire disregard of the plain directions of the statute. The distinction between them is palpable and it is fundamental. One who insures in a stock company pays a definite premium as a consideration for the risk which the company undertakes to indemnify him against, and he has no interest in the result of any other risk which the company may assume. He is simply an insured party, and not an insurer. It is indifferent to him whether the company accumulates profits, or loses a part of its capital, provided it does not become insolvent and thus unable to perform its engagements; whereas, one who insures in a mutual company is a shareholder in whatever the company may possess, and may be a loser to the amount of his interest in the common fund, or of his premium note if the provision for indemnity consists in such notes. He is personally, to that extent, the insurer of all other parties who hold policies; and such policy holders are to the same extent the insurers in his policy. Now, these defendants having organized under this law as a mutual company, besides their proper business as a mutual company, have deliberately entered upon the general business of insurance as

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though, in addition to their powers as a mutual company, they were organized as a stock company. The mutual branch of their business, as it appears from their by-laws, was organized upon the system of premium notes to be assessed for the payment of losses, and they have issued between three and four thousand policies, based upon such notes; and they have besides issued some five thousand policies like the one held by the plaintiff, to outside parties, who have no interest in or connection with the mutual enterprise, and who are not obliged to contribute anything towards the indemnity of each other, or of any of the parties holding policies issued upon the mutual branch of the business to parties who have given premium notes. The result will be, if this action can be sustained, that the premium notes may be enforced for the payment of losses to parties who are strangers to the mutual enterprise, and who can never be made to contribute anything to the indemnity of those who have given these notes if they should sustain losses from the risks which they are insured against. It is no answer to this view to say that the makers of the notes have had the benefit of the premiums paid by the outside parties. In the first place there is no such fact stated in the case; but if it were true, it could only operate as an equitable estoppel against the parties who had knowingly received the illegally acquired premiums, and would have no tendency to sustain an action on the policy, which must assume it to be a legal contract.

Nor is it any answer to the objections against this course of business that the charter contains a clause permitting it to be done. The associates, it seems, are empowered to frame their own charter, subject to the approval of the Attorney-General (§§ 10, 11); and that officer, in this case, overlooking the provisions referred to, certified that the charter conformed to the statutes of the State. The provision of the act requiring the approval of the Attorney-General did not enable him to license one of these companies to violate the law, and if an illegal provision is found lurking in a charter approved by him, it is not the less illegal because it escaped his scrutiny. The Legislature, by requiring his examination and certificate, sought to

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guard against the public inconvenience which would arise from the existence of a corporation apparently authorized to pursue a course forbidden or not authorized by law; but it did not authorize that officer to dispense with or modify any of the provisions of the statute.

There was submitted to us, in the course of the argument of the counsel for the plaintiff, a reference to the several special charters which have been granted by the Legislature from the earliest period down to the present time, and an abstract of the principal provisions of several of them. The argument deduced from them was, that the Legislature had in some of them recognized a course of business similar to that pursued by the defendants in this case, as falling within the description of mutual insurance. In some of them the method of working out the feature of mutuality is not prescribed, as in the case of the earliest one, the Washington Mutual Assurance Company, chartered in 1802 (Laws, 152). There was no joint stock to be contributed, but each assured party was to be a member of the company. There could be no policy, therefore, to outside parties. Each party holding a policy would be an insurer and an assured. In the Schoharie Mutual, chartered in 1831 (Laws, 280), the idea of mutuality was obtained by a provision in the ninth section, by which the parties insured were obliged to indemnify the directors in proportion to the amounts respectively insured by them in the company. It seems to have been assumed that the directors would have to pay the losses, and that the contribution of the adventurers would be enforced under that section. These two instances present the most imperfect of the schemes for effectuating the mutual feature; and without going through the list, it is sufficient to say that I find nothing in any of them giving any countenance to the suggestion that an insurance could be made by a mutual company, not also specially authorized by law to do a general insurance business, in favor of a person who was not at the same time responsible in some way as an insurer of the others.

There is a class of cases where the company was originally incorporated as a mutual insurance company, and was after-

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wards authorized by a special statute to transact a general business like a stock company. The Mutual Insurance Company of the City and County of Albany is a sufficient type of that kind of legislation. It was incorporated in 1836 (Laws, 315), upon the pattern of the Madison County Company, the plan of mutuality being arranged by means of premium notes. It was amended by an act of the Legislature in 1848 (Laws, 66). A person applying for insurance was authorized to pay the company "a certain definite sum of money in full for such insurance, which said sum (it was declared) shall be in lieu and place of a premium note;" and it was further declared that such person should not be liable, during the continuance of his policy, for any sum beyond the amount thus originally paid. By another section, the money thus received was made liable for losses and expenses, and was to be first expended for these purposes, before any resort could be had to the premium notes. Several other mutual companies were amended in a similar manner. The power of the Legislature, by a prospective enactment, to enlarge the powers of a mutual insurance company so as to permit it to transact a business in which there should be no feature of mutuality cannot be doubted. This is precisely what was done in this case. It is perfectly plain that the parties taking policies under this amendment did not assume any mutual relations with each other, or with those who had taken out policies, upon giving premium notes. They assumed the position of insured parties, and did not become in any sense insurers. As they were authorized to take policies in a mutual company, and were not to assume mutual relations, it was carefully provided, as was fit and proper, that they should incur no liability as the insurers of the others, and in effect that they should have no interest in the mutual business of the company. This was done by the provision that the sum to be paid by such parties should be "in full for such insurance," and that they should not be liable in any event to pay any further sum. It is altogether probable that the companies obtaining these additional powers were able to show to the Legislature that they had accumulated a capital in the course of their

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mutual business which rendered it safe for them and for the public to engage in a general insurance business as though they had contributed a capital stock. So far from proving that the business thus authorized is, or was considered by the Legislature to be, a species of mutual insurance, the legislation referred to presents the contrary view in a very strong light. The discrimination between the original members, bound together and made responsible for each other's losses by means of the system of premium notes, and the new parties authorized to come in upon precisely the same kind of contract which exists between insurance companies, not mutual, and their customers—and whose cases are carefully placed without the influence of the mutual principle—marks the difference between the two species of transactions as sharply as any argument which could be presented. The similarity of language, amounting almost to identity, between the provisions in the defendants' charter and the act amending the Albany charter, shows that it was intended by the persons who framed the first named instrument to do by their own authority what it required the whole legislative power of the State to accomplish in the other case.

I have never entertained the opinion that the system of premium notes was an essential feature of mutual insurance. I refer to it as only one of several methods by which mutual relations may be created among parties embarking in that business. In *White v. Haight* (16 N. Y., 310), I expressed the opinion, founded upon an examination of most of the charters of mutual companies which had been granted by the Legislature, that the principle of mutuality had theretofore been worked out by two methods only—by means of premium notes operating as mutual guarantees by each of the adventurers in favor of all the others, and by a provision for an annual accounting by which each insured party was secured a share of the profits in proportion to the premiums paid by him. A further examination of the charters, aided by the list and abstracts which have been furnished, has confirmed me in this opinion; for, independently of the cases in which the power to transact a general insurance business has been engrafted upon mutual charters, as in

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the amendments to the Albany charter, which are quite aside from the subject, and in the few early charters where the method of establishing mutual relations was not pointed out, the two modes referred to seem to be the only ones which have received the sanction of the Legislature. But I am far from thinking that the companies organized under the general act are confined to any particular system. The act leaves the associates perfectly free to organize such method of establishing mutual relations as they may see fit; only they cannot, under the pretense of carrying on mutual insurance, make contracts for insurance into which the mutual principle does not enter at all. The premiums may be required to be paid in cash, as in the companies chartered in the city of New York, with a provision for dividing the profits in proportion to the premiums paid; or, only sufficient may be exacted from the insured to pay the expenses, leaving the losses to be made up by assessments upon the guarantee notes; and it may be that a combination of the two methods might be adopted which would secure the same general result. If applicants were permitted to execute a guarantee, or pay an amount of money, at their election, with a provision that the money should be invested by the company for their benefit, and be repaid to them with its accumulations, so far as it should not be required to pay the proportion of losses and expenses which those who have paid it ought to contribute, the arrangement would not seem to me objectionable. Under the provisions in the defendants' charter, the insured parties might give notes or pay money; but then those who paid money paid it "in full for the insurance," and assumed no responsibility as to the other risks, while those who gave notes were liable to be assessed to their full amount for the payment of all losses which should be sustained by the other insured parties. I am unable to discover any mutuality between these two classes of dealers, and am quite sure none can be pointed out.

It has been argued that a kind of mutuality may exist between two classes of insured parties where the individuals of one class undertake, by means of premium notes, to be re-

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sponsible in certain proportions for the losses which any of the others may sustain, and those of the other class pay money in full for their respective insurance. The argument is that a sum of money to be paid down may be determined upon, which shall be equivalent to an undertaking to indemnify against a particular kind of casualty, and that it is to be intended, in favor of the policy of insurance in this case, that the insured were brought within the principle of mutuality by means of the adjustment of the premiums upon this theory. In the first place, there is nothing in the charter or by-laws of the company, both of which are before us, which indicates the existence of any such theory, or which tends to show that the persons who under this charter should pay money in full of their insurance would be required to pay any other or different amount than that usually exacted from insured parties upon the same risks in other companies. *Prima facie*, the payment of a given sum in full for a particular hazard will be taken to be the established price of such a risk, and any person who sets up, in a particular case, that the amount was arrived at by the application of other principles must show it. In the next place, it appears affirmatively in this case that no such theory was adopted. By the 5th section of the by-laws the proportion is stated between the premium notes, which were liable to be assessed for their full amount, and the cash premiums; by which it appears that the cash premiums were one-tenth, and one-twentieth of the amount of the notes, there being two classes of notes called the small ones and the large ones. We cannot intend that any mutuality was designed between two persons, one of whom pays \$1 in full and the other executes an engagement to be responsible for casualties to an amount not exceeding \$20.

But under the provision in question in this charter, any person applying for insurance may pay a definite sum of money in full for the insurance. If any person may do it, all the persons who wish to be insured may; and thus we have an insurance company in which the insured parties have no relation with each other, but each one has paid in full for his risk

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to the corporation, and the corporation has undertaken to indemnify him, and there is no other contract in the case. This is precisely the course of business of stock companies, and if a mutual company may thus transact its business, there is no difference between them. The position is that a sum certain contributed by one man may be so adjusted as to be substantially equivalent to the guarantee of another against the casualties of fire. That is true in a certain sense, and it is the principle upon which the rates of premium are ordinarily arrived at. The companies fix upon such rates of premium as that, upon the calculation of the chances of an extensive business, running through a course of years, they will receive an aggregate amount of money sufficient to pay all the losses, the expenses of the office, and a certain profit upon the funds employed. This is precisely what the argument supposes may take place between a mutual company, representing the makers of the premium notes on the one hand, and the parties who obtain policies upon the payment of a fixed sum in cash, on the other, except that no addition is made to the rate for interest on capital; none being required. There is no doubt a sort of mutuality between parties thus dealing. If the terms are fairly adjusted, the payment of money and the engagement of indemnity are just equivalent to each other. It is the same kind of mutuality which obtains between buyer and seller in contracts of sale: between employer and employed in contracts for services: and borrower and lender, and the like. But such parties are not mutual vendors, mutual employers and mutual lenders. So, in the business of insurance, the man who pays a fixed sum to be insured, and does not assume any hazard for any other person, may be considered as engaged in a matter in some sense mutual, but he is not a mutual insurer, for he is not an insurer at all. So of the assured in this case; if he is a party to a business of mutual insurance, he must have insured his associates as a consideration for being insured himself. To be a mutual insurer, he must in the first place be an insurer. An insurer is a person who undertakes to indemnify another against certain risks. They may happen, or they may not;

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and the essence of the contract is the assumption of the hazard. If he assumes no hazard—if, when he has paid his money, he is under no further liability—he cannot be in any conceivable sense an insurer; and if not an insurer at all, he cannot be a mutual insurer; and unless by his policy he becomes a mutual insurer, it cannot be said that the contract was made in the course of carrying on the business of mutual insurance.

The 21st section of this act has been sometimes relied on to sustain policies like the one under consideration. It would be enough to say that no such capital as the section refers to has been furnished to the defendants, and that therefore the provision has no application to them. But the section has not, I think, any bearing upon the question in any case. It is in substance an authority to the mutual companies to borrow money, and to allow the lender not only an interest on the amount, but a participation in the profits of the business besides. As the money is to be liable, like capital stock, to the payment of the company's debts, it was but reasonable that the lenders should be permitted to contract for an advantage proportionate to the risk of losing the principal. It resembles somewhat lending upon bottomry or respondentia; but I do not perceive that it bears at all upon the question whether a mutual company can make a policy for a sum certain where the insured does not take the obligations of an insurer upon himself.

I think the judgment of the Supreme Court was right, and that it ought to be affirmed.

WELLES, J., also delivered a dissenting opinion. After a line of argument—corresponding so nearly with that of DENIO, J., as to render its repetition unnecessary—to show that the act regards the systems of joint stock and mutual insurance as distinct and inconsistent; that it provides only for these two; requires each company to declare in its charter which of the two it will adopt; and that having made its election of either, it derives no power under the act to insure upon the other plan, and is forbidden by the general laws from exercising powers not so derived, the learned judge proceeded:

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It is a fair inference, and should be assumed, that this policy was issued under the provision last referred to, of the 8th section of the charter, as there is no color or semblance of authority for it elsewhere, either in the charter or the act.

The true construction of this provision, authorizing persons so electing to insure upon paying a cash premium in full for the insurance, and in lieu of a premium note, unquestionably is, that such insurances might be made upon a different consideration than is required of persons giving a premium note. The language is, that they "may pay a definite sum, *to be fixed by said corporation.*" It was beyond all doubt intended to allow the company to issue policies for cash premiums paid at the time at the same per cent upon the amount insured as stock companies usually adopt. If the charter in this respect can be sustained, there is clearly nothing to hinder a company thus organized, immediately upon commencing business, to depart from the plan of mutual insurance, and to transact all its business on the principle of a joint stock company, without a dollar of cash capital paid in, and in palpable evasion of the express requirements of the act, as the course adopted and pursued by the defendant fully illustrates.

The circumstance that it has in fact transacted some of its business on the mutual plan, does not weaken this view in the least. It is a mere question of power; and if the defendant could depart from that principle in any portion of its business, no good reason can be conceived why it could not abandon it altogether, and issue all its policies of insurance for such cash premiums as the corporation should direct, in full for the risks, and without any premium note or other obligation or liability on the part of the persons insured for the payment of losses or expenses, and thus become practically a joint stock corporation, or rather a company organized under the act, prosecuting business in manner and form as a joint stock company, without any stock paid in or invested, as expressly required by the act.

If any argument can be drawn from the history of the legislation on the subject of insurance, bearing on the question under consideration, instead of being in support of the validity

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of the policy in question, is against it. That legislation has been varied and fluctuating, evincing an unsettled state of the public mind on the subject. Mutual insurance corporations have been the invention of the present century. When first introduced they were purely mutual. When chartered to transact business simply on that plan, it was never supposed they possessed any corporate power to make insurance on the joint stock principle. The two plans are so diametrically opposite in their structures, and so incompatible in their operations, that it would be regarded by any intelligent court an unwarrantable assumption of power not given in a mutual insurance charter. At a later period, mutual companies were chartered with power to issue policies for cash premiums paid in full for the risks; and later still, companies in existence and in operation upon the mutual principle only, have procured amendments of their charters by which such power has been added. This shows that in the opinion of the Legislature the power did not exist in the absence of the legislative grant.

The Constitution of 1846 (art. 8, § 1), allowed corporations to be formed under general laws, and declared that they should not be created by special act, except for municipal purposes, and in cases where, in the judgment of the Legislature, the object of the corporation could not be attained under general laws.

The first general law on the subject of insurance corporations passed after the adoption of the Constitution, was the act of April 10th, 1849. That law, as has been shown, contemplated the formation of insurance corporations of only the two descriptions mentioned, in respect to the plan of operations, and to be at the election of the incorporators which plan to adopt. This act is the organic law of all corporations organized under it, which can no more transcend the powers intended to be conferred by it upon them than Congress can assume and exercise powers not delegated by the Constitution of the United States. If a company should be organized with a charter allowing the exercise of its corporate powers, by transacting insurance business on both of the plans mentioned, indiscrimi-

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nately, it would constitute a third class, for which the act makes no provision. It is reasonable, therefore, to suppose that the framers of the Constitution intended, by the provision referred to in that instrument, among other things, to check the fluctuations of legislation on the subject of insurance, as well as other corporations not municipal, and to bring about, by means of general laws, a greater uniformity in their features and principles of operation.

The conclusion to which I have arrived, after much reflection and a careful consideration of all the provisions of the act under which the defendant was organized, is, that the provision of its charter allowing persons to insure for cash premiums, paid in full for the risks and in lieu of the premium note, was inconsistent with its declared mode and manner in which the corporate powers given under and by virtue of the act were to be exercised. That having, in pursuance of the 10th section of the act, declared in its charter such mode and manner to be that of mutual insurance, and having been organized as a mutual insurance company, the corporation possessed no power to transact insurance business on any other plan. That the policy of insurance upon which the action was brought was not a mutual insurance policy, and the contract contained in it was therefore unauthorized and void, as being out of and beyond the corporate power of the defendant to make.

COMSTOCK, Ch. J., was for reversal on the ground first discussed in the opinion of SELDEN, J. DAVIES, CLERKE, BACON and WRIGHT, were understood to concur fully in Judge SELDEN's opinion.

Judgment reversed, and new trial ordered

91	89
114	450
21	89
143	165

THE PEOPLE v. WHEELER *et al.*

A commissioner of highways is not a judicial officer within the statute prohibiting judges taking part in proceedings in which a relative within the ninth degree is interested.

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The applicant for the discontinuance of a highway is not a party within the meaning of the statute. The public is the real party in interest. The applicant acts on its behalf.

APPEAL from the Supreme Court. *Certiorari* to review the proceedings of the commissioners of highways of the town of Dover in discontinuing a highway. After the commissioners had made their return to the writ, they certified, in obedience to a requisition from the Supreme Court, that one of them who had acted throughout the proceedings was a brother of the person upon whose application they had been instituted. At a general term in the second district, judgment was rendered, setting aside the proceedings of the commissioners with costs, from which they appealed to this court.

Joseph F. Barnard, for the appellants.

John K. Porter, for the respondents.

WRIGHT, J. The appellants, on the application of a person liable to be assessed for highway labor, and after the certificate of twelve disinterested freeholders had been delivered to them, as required by law, made and signed an order discontinuing a road as useless and unnecessary. The order was regular, and fully complied with the requirements of the statute, and the commissioners were shown to have acquired jurisdiction over the subject matter.

The Supreme Court reversed the proceedings of the commissioners, and awarded costs against them, on the single ground, not appearing in the record, that the applicant for the discontinuance of the road was a brother of one of the commissioners who took part in the proceedings, concurred in the determination to discontinue the road, and signed the order to that effect. We think the judgment cannot be sustained, for reasons that will be briefly stated.

1. The record did not show that the applicant was related to the commissioner, and the court below assumed to act upon

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a fact not appearing therein, and which the commissioners were not required by the court to return. The main inquiry on *certiorari* relates to the power or jurisdiction of the inferior tribunal, and the question can only be determined by matters appearing in the record. When an examination into collateral facts, not properly appearing in the record, is desired, to show want of power or jurisdiction, the appropriate remedy is not by *certiorari*. The record in this case properly included the application, the certificate of the freeholders, and the order of the commissioners; or, at most, a history and recital of all the official acts of the commissioners in the course of the proceedings for discontinuing the road. The original return of the commissioners contained all that they were required by the exigencies of the writ to return. The record, therefore, did not and could not show that the applicant was a brother of one of the commissioners; and it was only by what is called in the Case an additional return, compelled by the Supreme Court, that this collateral fact appeared on which a reversal of the proceedings was grounded. The judgment, therefore, was predicated upon a fact not appearing in the record, nor called for by the exigency of the writ, and in respect to which the writ itself, though commanding divers extraneous and irrelevant matters to be certified and returned, made no allusion. The proper record of the statutory proceedings for discontinuing the road, from their inception to the making of the final order by the commissioners, shows no relationship existing between the applicant and either of the commissioners.

2. If it were conceded that the applicant was a brother of one of the commissioners who made the order to discontinue the road, the action of such commissioner, in conjunction with his associates, was not such an irregularity, or usurpation of power, as to vitiate the proceedings. This involves the single inquiry, whether a commissioner of highways is incompetent to act, where the applicant for the discontinuance of a public road is his brother. The only judicial power exercised by the commissioner was in deciding, in conjunction with his associates, to discontinue the road, after the certificate of the free-

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holders, that it was useless and unnecessary, had been delivered to them. The summoning and swearing of the freeholders were ministerial acts. It may be admitted, that the statutory provision disqualifying a judge of any court from sitting as such in any cause in which he would be excluded from being a juror by reason of consanguinity or affinity to either of the parties, is but declaratory of a universal principle, applicable to all who are clothed by law with judicial functions. No judge or officer exercising judicial authority should take part in the decision of any matter or controversy, in which he is personally interested, nor in any cause in which he would be excluded as a juror from consanguinity to either of the parties personally interested in the litigation or matter to be judicially determined. But the difficulty lies in applying the principle to the case in hand, or rather in bringing the case within the reason of the rule. An applicant for the discontinuance of a public highway can in no just or proper sense be termed a party to a cause or judicial controversy. The statute empowers any person liable to be assessed for highway labor to initiate the proceeding by an application in writing addressed to the commissioners of the town in which he resides, but he can do nothing more, and beyond that act he has no control, nor is he recognized as a party in the subsequent proceedings. Indeed, the initiatory act amounts to nothing, unless the freeholders certify that the road is useless and unnecessary. It is not the proceeding of the applicant in the determination of which he has an exclusive personal interest, nor is it his cause in a judicial sense. Indeed, the statute does not contemplate that the applicant should have any direct personal interest in the determination. The public, and not the applicant, are substantially the parties to the proceeding; and it is the public, and not the applicant exclusively, that is interested in, and to be affected by the exercise of the power entrusted to the commissioners. It is on the ground of bias, imputed from interest in, or relationship to the parties interested in a judicial controversy, that the judge is disqualified from acting; but the reason of the rule can have no application to a proceeding of this nature, wherein the really interested parties

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are the public, and the exercise of the judicial functions of the officer or board of officers is dependent on and can only follow a strict pursuit of the provisions of the statute. It would certainly surprise the public and the profession to learn that a commissioner of highways is legally incapacitated from acting in any proceeding for laying out or discontinuing a public road, when the applicant is a brother or cousin of such commissioner, or even more remotely related to him. The case of *Oakley v. Aspinwall* (3 Comst., 547), is no authority for such a position.

The judgment of the Supreme Court should be reversed, with costs of the appeal to this court.

DENIO, J. The Supreme Court reversed the order of the commissioners because the brother of one of their number was the applicant for the discontinuance of the highway. The statute disqualifying judges under certain circumstances does not reach the case. It applies only to judges of courts, and the commissioners do not fall within that denomination. I do not think there is a close analogy between the cases. An act of public administration, though requiring the exercise of judgment, is quite a different thing from the dispensing of justice between man and man; and although a public officer ought not to act in a matter in which he has a private interest, the objection is not so strong where he is only connected by consanguinity with a person who has such an interest. The management of the internal affairs of towns and villages is intrusted to such of the inhabitants as may be selected by the suffrages of the other inhabitants; and many of the subjects of administration are such as affect the private interests of a large number of the people of the town. A rule which should preclude the officer from acting in all cases where a relative within the prohibited degree had an individual interest, would, I presume, be found quite inconvenient. Take the case of assessors, for instance: Under the rule contended for, no assessor could take part in the valuation of the property of any of his relatives within the ninth degree of consanguinity; and so of the auditing of town and county charges, and many other subjects,

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The common law disqualifies one from acting as a juror in such cases, and the statute has extended the disqualification to judges of courts. To enlarge the rule still further, so as to embrace administrative officers, requires, in my opinion, an act of the legislature.

But it does not appear that Thomas Wheeler had any pecuniary interest in the question whether the road should be discontinued or not. All that is stated is, that he was an inhabitant of the town, and liable to be assessed for highway taxes. This was no doubt true of the commissioners themselves, and of all of that class of officers in the several towns. True, he applied for the order of discontinuance, as any taxpaying inhabitant might have done. All such inhabitants are recognized by the statute as having such a public interest as entitles them to promote such a proceeding. It may be said that by making the application he became a party to the proceeding, and that his position is analogous to that of a plaintiff in a suit; but I do not see that in any event the decision would charge or exempt him from the payment of any costs or expenses. There could be no judgment for or against him. Those who should oppose the order would be parties in the same sense; but I think that none of them sustain such a relation to the officers who are to pass upon the motion, as litigants sustain to the judges and juries who are to try the case. The situation of Thomas Wheeler more nearly resembles that of a complainant on the trial of an indictment. It might be good cause of challenge for favor to a juror that he was a relative of the prosecutor, but it would not *ipso facto* disqualify him.

Upon the whole matter, I am of the opinion that the order was not erroneous for the reason for which it was reversed by the Supreme Court.

All the judges concurring,

Judgment reversed, and proceedings of the commissioners affirmed.

Rochester City Bank v. Elwood.

21	88
120	566
120	570

ROCHESTER CITY BANK v. ELWOOD.

A bond conditioned for the faithful discharge by one of the obligors of "the trust reposed in him as assistant book-keeper" of a bank, is an engagement that he will not avail himself of his position to misapply or embezzle the funds of his employer.

The appropriation by the book-keeper of the bank's money and making fraudulent entries to avoid detection is a breach of the bond as against a surety therein.

It is immaterial that the embezzlement was committed while the book-keeper was employed in keeping a journal which, when he entered upon his duties, and usually, was kept by the teller, and that the fraudulent entries were made in such journal.

APPEAL from the Supreme Court. Action upon a bond reciting that one Gold had been appointed assistant book-keeper of the Rochester City Bank, and conditioned that he should "faithfully discharge the trust reposed in him as such assistant book-keeper." Breach, that Gold on the 5th of January, 1853, "while in said plaintiff's employment as such assistant book-keeper, wrongfully took and appropriated to his own use of the moneys of the plaintiff in the plaintiff's banking office, the sum of \$1,000; and then and there made false and fraudulent entries in the books of the plaintiff for the purpose of concealing from observation and detection such appropriation." Upon the trial it was proved that from the organization of the bank until several months after Gold entered into its service a certain credit journal was uniformly kept by the teller in which entries were made by him of the deposits in the bank. Gold had nothing to do with the keeping of this book, which was called the Teller's Credit Journal, until December 1851, when, in consequence of the teller's duties being made more onerous by the absence of the cashier, Gold was required by the officers of the bank to assist the teller in keeping it. He did so until January 8th, 1853, when he left the bank. On the 5th January, 1853, the sum of \$1,000 was abstracted from the funds of the bank. There was evidence tending to show that Gold en-

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tered in the journal a credit to a depositor of \$625, instead of \$1,625 actually deposited by him, and that the cash had been counted at the closing of the bank for the day and found to agree with the balance as shown by the books. Gold then changed the entry in the credit journal and in the account with the customer from \$625 to \$1,625, so that detection would not ensue on production of his pass-book. The loss was not discovered till February. The judge nonsuited the plaintiff on the ground that no breach of the bond had been shown. The judgment upon the nonsuit was affirmed at general term in the seventh district, upon the ground that although a technical breach of the bond had been shown, in the making of the false entry, yet that the plaintiff was only entitled to nominal damages, and that a new trial ought not to be granted to correct an error by which he was deprived of them. The plaintiff appealed to this court.

John K. Porter, for the appellant.

Henry R. Selden, for the respondent.

WRIGHT, J. The evidence would have justified the jury in finding that about the 5th of January, 1853, Gold, who had acted as assistant book-keeper in the Rochester City Bank for two years previously, embezzled the sum of \$1,000 of its funds; and made false and fraudulent entries in the books of the bank, with the view and for the purpose of concealing from observation and detection such embezzlement, until he could place the property beyond the reach of reclamation. In March, 1851, the defendant Elwood obligated himself to the plaintiff, as the surety of Gold, that the latter should faithfully discharge the trust reposed in him as an assistant book-keeper of the bank. The single question is, whether the embezzling of the funds by Gold, under cover of false entries in the books of the bank, was a breach of the undertaking of the surety.

It is important to ascertain the nature and extent of the engagement of the surety as indicated by the written contract.

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Though the rule of strict construction in favor of a surety excludes implied engagements, and calls for exact performance of express stipulations, it has no application to the construction of the written undertaking. In this respect, there is no difference between the contract of a surety and that of any other party. The instrument in this case by which the parties become bound, is to be construed, no less as to the surety than the principal, with reference to the situation of the parties, and the hazards against which the plaintiff exacted security, as a condition to introducing an employee into the bank.

The language of the instrument is peculiar. It recites that Gold has been appointed assistant book-keeper of the Rochester City Bank, and the engagement of principal and surety follows, that he "shall faithfully discharge the *trust* reposed in him as such assistant book-keeper as aforesaid." Now, within the intention of the parties, was this simply an undertaking that Gold would keep, with reasonable skill and care, such books of the bank as he might properly be required to keep as assistant book-keeper, and nothing more? If it was, then not only the surety but the principal, would be absolved from liability on the undertaking, even though the latter, availing himself of the facilities afforded by his fiduciary position, should defraud the bank or suffer it to be defrauded. If Gold, taking advantage of the opportunities which his position afforded him as an employee of the bank, should himself abstract, or permit others to abstract the funds or property of the bank, his act would not fall within the scope of his or his surety's contract provided they only intended by such contract to vouch for his care and skillfulness as a book-keeper, and not for his honesty or fidelity to his trust as an employee of the bank. I do not think the undertaking can be so read or construed. I agree that the surety cannot be holden beyond the fair scope of his engagement as intended by the parties when undertaken; but the question is what was this intention, as expressed in the instrument, construed in the light of the circumstances surrounding its execution. Gold had been selected for a post in a banking institution which brought him into close and constant

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proximity with its money and property. His place was behind the counter of the institution, and, practically, he had nearly the opportunity of the cashier or teller to embezzle the funds of the corporation, and a better one to conceal such embezzlement, and prevent its immediate detection. The receiving and paying out of the money of the bank was done by the cashier or teller, but it was not their duty to keep constant and exclusive watch over it. The temptations to purloin money constantly beset those employees of a bank who are directly within reach of it. These things are presumed to have been known to the parties; and under the circumstances the defendant Elwood guarantees that the appointee shall faithfully discharge a trust, as one of its employees, reposed in him by the bank. Now, can it fairly be said that the parties only contemplated, and Elwood only intended, a guaranty that Gold should keep the books of the bank correctly, and that if a loss ensued from a default in this respect he would respond to the extent of such loss? I think not. It will not be pretended that this was all the obligation intended, and resting upon Gold by virtue of the contract; and the obligation assumed by the surety was coëxtensive with that of the principal. The bond exacted was in the penal sum of \$5,000, and it is scarcely supposable that, in the contemplation of the parties, it was merely intended to indemnify the bank against injuries resulting from Gold's unskillfulness or negligence as a book-keeper, and not against his dishonesty or infidelity to his trust as an employee of the bank. It seems to me that, to carry out the intent of the parties, the instrument should be construed as an absolute engagement of the defendant for the integrity and fidelity of his principal in the discharge of the trust reposed in him as an assistant book-keeper in the bank. The contract did not define the trust reposed, but indicated the department of duty to be assigned, and guaranteed that the appointee was a trustworthy person to be introduced into the bank to discharge that duty. Its obvious intention was to vouch for his honesty and fidelity to his trust as an employee of the bank. I am aware that it was decided in Virginia, by a divided court, in the case of *Allison v. Farmers'*

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Bank (6 Rand., 204), that a bond similar to the one in question did not cover the felonious taking of money by a book-keeper from the drawer of a bank. I do not think the case ought to be followed, or its principle extended by applying it to the present case. The conclusion is reached by a majority of the court that the surety, when he signed the bond, did not intend to bind himself that his principal should not commit a felony. By a like mode of reasoning a like conclusion might be reached in the case of a cashier or teller, who, after receiving and duly depositing the money of the bank in its drawers, should steal it, and the like question might be asked, whether his surety intended to bind himself that his principal should not steal. "Say," said one of the judges, "he would be bound to discover such felony and fraud in another; no one is bound to accuse himself of a felony, nor can the condition of this bond be construed to bind him to do so, or that the bond shall be forfeited if he does not. Even if it was a bond *expressly* that he should not commit any felony in the bank, he would not be bound to discover it on himself. The concealment [by subsequent false entries] was a mere *non-discovery* of a felony." If the principles upon which this case was decided are to be imported into our law, I see not why every teller may not make false entries and every book-keeper abstract funds at pleasure, being exonerated from liability on their respective bonds by transcending the limits of the trust reposed. The doctrines put forth in the majority opinions would substantially cancel all official bonds for the safe keeping of corporate or public funds.

The plaintiff was nonsuited at the circuit on the ground that Gold was acting as teller, and not as assistant book-keeper, in making the false entries in the Credit Journal; and the decision was affirmed on the grounds, 1st. That the wrongful taking of the plaintiff's money by Gold was no breach of the bond of the surety, as he had covenanted only that Gold would faithfully discharge the duties of an assistant book-keeper; and 2d. Though the making of the false entries on the books of the bank might technically sustain the action; yet as no loss resulted as a consequence of those entries, the

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plaintiff would be only entitled to nominal damages, and a new trial should not be granted for that purpose. I think an erroneous construction was put on the undertaking of the surety, both at the circuit and general term.

It appeared in evidence on the trial, that up to December, 1851, the teller of the bank had kept the book called the Credit Journal, in which was daily entered, from slips, the amount of cash and deposits received. In December, 1851, the cashier of the bank requested Gold to take charge of and keep this book. He did so, and kept it exclusively for thirteen months prior to the transaction out of which this litigation arises. The defendant's counsel claims primarily that (conceding Gold made false entries for a fraudulent purpose in this Credit Journal), there was no breach of the bond established, as the entries were made as assistant teller, and not as assistant book-keeper, and for Gold's acts in that capacity Elwood is not responsible. Within the narrowest construction of the bond, this position cannot be maintained. Conceding that the surety covenanted that Gold should do his duty as an assistant book-keeper merely, making entries in the Credit Journal was book-keeping, and was within the range of the class of duties that might be appropriately assigned to an assistant book-keeper. The teller, it is true, kept this book for some months after Gold went into the bank; and in doing so, it might be more appropriately said that he was acting as assistant book-keeper. We are not informed what books were assigned to Gold to keep when he entered the bank; but is not the idea an absurd one that the managers of the bank could not assign to him the keeping of another book without releasing the surety from his obligation? In keeping the Credit Journal, Gold had nothing to do with receiving and counting the cash. All that he did was to make entries in the journal of cash receipts from slips furnished by the cashier or teller. He had nothing to do with receiving money, and he was no better able to abstract it from the drawers or vault of the bank than though he had been confined to making entries in the ledger or other books of the corporation. All that can be said is, that being disposed to embezzle the

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money of his employers, he was better able to cover up the wrongful act by falsifying their books, and thus temporarily avoiding detection.

It is conceded that unless the position stated be tenable, the false entries by Gold in the Credit Journal, and the error or alteration in the ledger account of the depositor, amounted to a technical breach of the condition of the bond. But if my construction of the instrument be correct, that the surety undertook for more than the faithful discharge of the mere duties of a book-keeper, there was something beyond a technical breach. I cannot doubt that the covenant that Gold should "*faithfully* discharge the trust reposed in him as assistant book-keeper," included within its scope and intention an engagement that the employee would not transcend the limits of the trust reposed, in availing himself of his position to misapply or embezzle the funds of his employer. There has not been a faithful discharge of the trust reposed in a book-keeper of a bank, who transcends the limits of and abuses his trust, and loss thereby accrues to his employers. In *Barrington v. Bank of Washington* (14 Serg. and Rawle, 405), it was held that the sureties in the official bond of the cashier of a bank, conditioned that he would well and truly perform the duties of cashier to the best of his ability, not only undertook for the fidelity and honesty of the principal, but also that he should perform the duties with competent skill and ability, and if he transcended the known powers of the cashier, by changing the securities of the bank without their knowledge, and loss accrued by the abuse of his trust, the sureties were answerable for the loss. I think, also, where a person is introduced into and employed by a bank to assist in keeping its books, and avails himself of his situation to defraud his employers, the surety who has vouched for his honesty, and engaged that he will be faithful in every way to the trust reposed in him, should answer for any loss accruing from his fraudulent or criminal conduct. Irrespective, therefore, of false entries, the abstraction of the money in this case by Gold would render the surety liable for the loss. But more especially would he be liable if the false entries were

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concurrent and simultaneous, and each a part of the *res geste* of guilt. There can be no doubt that the surety would have been liable for the loss, if Gold, by making the false entries, had enabled a confederate to take the money undetected; and the principal and surety cannot evade this liability by the former taking the money himself. It would be no defence to Gold (and the obligations of surety and principal on the bond are coëxtensive), that the false entries were made for the sole purpose of enabling him to embezzle the money undetected, and remove it to a place of security, and that he thereby accomplished such object. He is using a means which his agency puts in his hands to successfully consummate a wrong towards his employer. The evident purpose of the false entries was to shield the culprit and prevent the money from being reclaimed. The taking and entries were one transaction, and it seems to me it can hardly be properly contended that the ultimate loss of the money by the bank was in no degree attributable to the false entries and Gold's abuse of his trust as book-keeper. It is true, the loss to the bank was not wholly consequent upon the act of falsifying its books; but such falsification was parcel of the wrongful act of Gold by which a loss ultimately accrued to the bank.

These views lead to the reversal of the judgment, and the ordering of a new trial.

All the judges (except SELDEN, J., who took no part in the decision) concurring,

Judgment reversed, and new trial ordered.

Belmont v. Coleman.

BELMONT v. COLEMAN *et al.*

Whether a judgment recovered against a corporation is any evidence of its indebtedness in an action against a stockholder to enforce his individual liability, *quere*.

A recovery against the stockholder, sustained upon a referee's finding of the fact that the judgment against the corporation was upon a bill of exchange drawn by its agent upon and accepted by the corporation.

APPEAL from the Superior Court of the city of New York. Action to recover of the defendants, as stockholders of the Mexican Ocean Mail and Inland Company, the amount of a judgment recovered by the plaintiff against such company, upon which an execution had been returned unsatisfied. The ground alleged for the personal liability of the defendants, was that the capital stock of the company had not been paid in. The trial was before a referee, who found all necessary facts to charge the defendants, provided the indebtedness to the corporation was established. Upon this question he found as facts that two drafts for \$4,000 each were drawn in Mexico by the Vice-President and agent of the corporation, upon its President at New York; that such drafts were accepted in writing by the corporation; that not being paid at maturity, the judgment was recovered upon them, which was the foundation of the plaintiff's claim. There was evidence before the referee tending to show that the consideration for which the drafts were drawn, was the mules, carriages, &c., &c., furnished by the payees, and necessary for the prosecution of the business of the corporation in transporting mails and passengers through Mexico. The defendants moved for a nonsuit, which was denied, and they took an exception. Such other facts as are material appear in the following opinion. The judgment entered upon the referee's report, in favor of the plaintiff, having been affirmed at general term, the defendants appealed to this court.

John H. Reynolds, for the appellants.

Thomas H. Rodman, for the respondent.

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BACON, J. The object of the suit is to enforce a liability arising from the provisions of the act passed April 12, 1852, for the incorporation of companies formed to navigate the ocean by steamships. The 6th section of that act provides, in substance, that the stockholders of any such company shall be liable to the creditors of such corporation to an amount equal to the stock held by them respectively, until the amount of the capital stock shall be paid in. A subsequent section attaches this liability to every owner of stock, although he does not appear upon the books to be a corporator. And the 8th section of the act requires as a pre-requisite to the attaching of any such liability, that a suit shall have been brought for any debt claimed against the corporation, and an execution returned unsatisfied in whole or in part.

The complaint avers all the necessary facts which are claimed to create the liability; and, among others, that a judgment was duly recovered against the Mexican Ocean Mail and Inland Company, in which company the defendants in this suit were the equitable owners of three hundred and seventy-five shares of stock at the time of the creation of the debt upon which the judgment was recovered: the issuing of an execution thereon and its return unsatisfied. In relation to the averments of the complaint, as to the indebtedness and the judgment founded upon it, the answer simply ignores any knowledge or information, and sets up in respect to them no substantive or affirmative defence.

Upon the trial it is stated that the judgment roll, the execution and the sheriff's return were read as stated in the complaint, which appears to have been done without objection; and the referee in his report finds the fact of the recovery of such judgment, and the issuing and return of execution thereon. The roll is not set forth in the Case, nor does it appear whether the recovery was obtained upon a contested trial, by confession or default. The legal conclusion of the referee, by which he finds the plaintiff entitled to judgment, evidently proceeds upon the assumption that the judgment rendered against the company was *prima facie* evidence of the debt, and no further

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proof was required, either as to the origin, existence or nature of that indebtedness. If he was right in this conclusion, then the report is right, and we are not required to go behind the judgment to inquire whether a prior legal liability ever in fact attached to the corporation.

Upon principle, and as the fair result of all the authorities on this point, I am satisfied that the referee came to a just conclusion. The question first arose and was decided in 1822, in the case of *Slee v. Bloom* (20 Johns., 689), under an act of 1811, imposing a personal liability upon stockholders of a dissolved corporation, for all debts due and owing at the time of the dissolution. There was no clause in this act requiring a preliminary action against the company to recover the debt, but the directors of the company had liquidated the demand of the plaintiff, and given him a judgment by confession. The question was, whether that judgment was sufficient evidence of the indebtedness, unless impeached by proof of mistake or fraud. Chancellor KENT originally held that the judgment, although binding upon the company in its corporate capacity, was not upon the defendants when the statute liability was sought to be enforced; and that the acts of the trustees of the corporation were not the acts of agents or trustees of the individual stockholders.

In the Court of Errors this decision was reversed, and in the opinion of Chief Justice SPENCER, which is the only one given in that court, the ground is maintained that the defendants were chargeable with the debt, on the principle that the trustees, as the agents of the stockholders, had contracted the debt and fixed the liability, and that the latter could impeach the consideration of the indebtedness upon no other ground than that of fraud or error in the liquidation; nor could this be done without laying a proper foundation for it in the pleadings. "We must regard the judgment," he says, "as a solemn admission of indebtedness; but it is not binding as *res judicata* upon the stockholders if it was procured by fraud, or is founded in error."

The rule of law thus laid down by the court of last resort,

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was directly recognized and approved by the Supreme Court in the case of *Moss v. Oakley* (2 Hill, 265). That was a suit against a stockholder of the Rossie Lead Mining Company to enforce a personal liability, under the act creating the company; the provision being almost identical in language with the one in the act we are now considering. The declaration in that case alleged simply the execution of a promissory note by the company, and that a judgment was recovered upon it, execution issued and returned unsatisfied. The same objection was taken that the judgment was not sufficient evidence of indebtedness, and that the facts authorizing the giving of the note should have been averred in the pleadings. But BRONSON, J., in giving the opinion of the court, says: "As against the company, the judgment is conclusive evidence that the note was valid, and although the defendant was not directly a party, yet as a stockholder he was not altogether a stranger to the judgment. As against him, I think the declaration makes out a *prima facie* case of indebtedness by the company." And in support of this proposition, he cites the case of *Slee v. Bloom*, approvingly.

Thus the rule stood unquestionably until 1848, when the case of *Moss v. McCullough* (5 Hill, 181), was decided. In that case COWEN, J., started a new doctrine, to wit: that the stockholders were substantially guarantors of the debts of the company; and this being a position regarded with somewhat of indulgence, and requiring a strict performance of all precedent conditions, it was held that the original indebtedness of the company must be strictly proved, and that the judgment recovered against the corporation was not conclusive, nor even *prima facie* evidence of the validity of the debt. The case went back for a new trial, and upon that trial the judgment was again given in evidence, together with proof tending to show the consideration of the note upon which the judgment had been recovered, and the manner of its execution, &c. A verdict having been rendered for the plaintiff, the case went to the Supreme Court, where the judgment was affirmed, and it was then carried by writ of error to the Court of Errors, where it

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was reversed by a vote of eleven to eight (5 Denio, 567). That reversal, however, as the report of the case discloses, turned entirely upon other questions, and, as the marginal note shows, brought under discussion the power of corporations to give promissory notes, and what was sufficient proof of authority to one who acts professedly as the agent of the corporation. The question of the character of the evidence afforded by the production of the judgment record, is only incidentally spoken of by Senator LOTT, who gives the leading opinion, while in none of the other opinions is any allusion whatever made to it.

The case went back once more for trial to the circuit, where the defendant prevailed, but came again before the Supreme Court at general term, in the third district, where, upon an opinion given by WILLARD, J., a new trial was again granted. In this opinion (7 Barb. S. C. R., 279), Mr. Justice WILLARD takes occasion to re-state and vindicate the decision made by him originally at the circuit, in which, following the rule established in *Slee v. Bloom*, he held the judgment recovered against the company *prima facie* evidence of the indebtedness, only liable to be impeached for fraud or mistake. He shows also that the authority of that case is not in any degree shaken by the decision of the Court of Errors, in *McCullough v. Moss* (5 Denio, 567). This is the latest reported authority in our courts. It does not appear what was the ultimate fate of this case, which had been some seven or eight years on its travels to and fro through the courts; but we are informed in the opinion given in this case by the Superior Court of New York, that a case precisely similar in its features was tried in the third district, and the same rule as above stated was declared to be the law of the case. From this judgment I understand an appeal was taken to the Court of Appeals, and after three arguments the judgment was affirmed upon an equal division of the court. (*Moss v. Averell*, 6 Seld., 449.)

This being the state of things in reference to this question, an opportunity is fairly presented to reaffirm the law as declared nearly forty years ago by the highest legal tribunal in

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the State, and which remained unquestioned for over twenty years, or now to declare the rule henceforth to be that a judgment recovered in any manner against a corporation is not in the least degree evidence of any indebtedness by the corporation. I think we should adhere to the original rule, which stands upon the highest authority, and can be fairly vindicated on principle. All that a creditor of a company, seeking to enforce this personal liability upon a stockholder, is required to prove, is the existence of the debt, and that judgment has been obtained, and execution issued and returned as the statute requires. A judgment against a corporate body is one of the highest evidences of indebtedness known to the law; it is a solemn admission by record that the corporation owes the sum claimed in the suit. Nor do I think it necessary that it should be found, or that we should assume, that it was an adversary judgment, if by that is meant that it was only rendered upon the trial of an issue contesting the claim. A judgment by confession, in the absence of any pretence of fraud or collusion, is just as conclusive upon a corporation as one rendered after litigation; and a judgment by default is only another mode of declaring by a record estoppel that the corporate body has no just defence, and can say nothing in bar of the claim preferred against it. And therefore, where as in this case acceptances are proved to have been made by the company, and a judgment has been rendered upon such acceptances, and no evidence whatever has been given to show that such acceptances were for an unauthorized or illegal purpose, and no attempt to impeach the judgment for collusion, fraud or mistake, the creditor has fairly made out his case, and the liability of the stockholder is maintained.

I will only add that I had occasion to examine the law upon this subject, in a case before me at special term, some years since, and came to the conclusion, with Judge WILLARD, that the rule in *Sloc v. Bloom* was still the law of this State, and so held. The case is reported in 9 Howard Special Term R., 426, which I do not, of course, cite as an authority in this court; but as the judgment was affirmed, and the opinion adopted by

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the general term in the fifth district, it has the sanction of that tribunal, and therefore it may perhaps be said of it in this aspect, "*valeat quantum valere potest.*"

Arriving at this result, it may not be material to examine the questions made upon the argument which go behind the judgment, and attempt to attack the foundation on which it rests, although my conviction is that there is no serious difficulty, even in that aspect of the case, in maintaining the propriety of the report. The conclusions of fact by the referee are either amply sustained by the evidence, or there is at all events enough to warrant him in finding, as he does, that the defendants were equitable owners of the stock, and that the bills of exchange were duly drawn upon and accepted by the company. This would be sufficient to raise a presumption that the acceptances were made not only for a lawful purpose, but upon a sufficient consideration, and the duty would be cast upon the defendants to show that they were given for illegitimate purposes, entirely foreign to the objects, and beyond the powers of the corporation. So far from proving any such state of facts, the evidence rather establishes the conclusion that the acceptances were given for rolling stock procured for the use of the company, an object not only lawful, but indispensable to the operations of the association. Upon all the facts, the report of the referee is right, irrespective of the conclusion of law which holds the proof of the judgment *prima facie* evidence of indebtedness on the part of the company. The judgment should be affirmed.

DENIO and CLERKE, Js., concurred fully in the above opinion; all the judges were for affirmance upon the grounds that there was no error in the admission of evidence, or in the refusal of a nonsuit, but COMSTOCK, Ch. J., SELDEN, DAVIES and WELLES, Js., refused to commit themselves to the doctrine that a judgment against the corporation is even *prima facie* evidence against a stockholder.

Judgment affirmed.

MOORE v. WESTERVELT.

MOORE v. WESTERVELT, Sheriff, &c.

The plaintiff brought replevin against the master of a vessel lying at a pier in New York for her cargo of coal. The sheriff declining to deliver the coal to the plaintiff till his sureties should justify, put a keeper in charge of the coal with the consent of the master. The vessel sunk at the wharf, and the plaintiff brought this action to recover the damages sustained by the coal, and the expense of raising it: *Held*,

The sheriff did not, under the circumstances, become an insurer of the coal by not removing it from the vessel.

Whether he was guilty of negligence in not taking proper precautions for the security of the vessel, was, under the circumstances, a question for the jury.

It seems that a sheriff having in his custody property which is the subject of litigation, is responsible for more than ordinary diligence.

A bill of lading, executed by the master of the vessel, is not admissible as any evidence of the quantity of coal on board the vessel.

APPEAL from the Superior Court of the city of New York. Action against the sheriff of New York for not delivering to the plaintiff one hundred and sixty tons of coal. Upon the trial it appeared that the plaintiff brought replevin against the master of the schooner *Calcutta* for the coal in question. Upon the writ being delivered to the sheriff, he proceeded, in company with the plaintiff, to the pier at the foot of Broome street, on the north side of which the *Calcutta* was lying. There was evidence that the master then offered to deliver the coal to the plaintiff, but the offer was declined, and he was referred to the plaintiff's attorney to arrange the matter. The sheriff proposed that the coal should remain upon the vessel until the plaintiff's sureties in the replevin should justify, on the following Tuesday. The sheriff left a keeper to see that the coal was not removed. The captain appeared to have abandoned the vessel and lived on shore, but he left some men on board. The next day the captain came to the wharf and suggested to the keeper or watchman left in charge by the sheriff that he should get out some lines for the purpose of securing the vessel

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against accidents. The keeper declined to do anything except see that the coal was not removed. There was conflicting evidence, as to a request by the captain to the keeper to permit him to remove the vessel from the north to the south side of the pier as a place of greater security in case of a storm, and a refusal on the part of the keeper to allow it. A storm came up from the northeast in the course of the night, and the vessel sunk at the wharf. She was loaded so that her deck was within a foot of the water, and leaked badly. A vessel loaded with coal, lying on the opposite side of the pier, sustained no injury from the storm. There was evidence tending to show that the location of the vessel was obviously unsafe to any person acquainted with nautical affairs. On the other hand, there was evidence that the sheriff's keeper was a man of experience, and that in his judgment the vessel was in a position of ordinary security.

The plaintiff, under exception by the defendant, gave in evidence a bill of lading of the coal, signed by the master, stating its quantity to be one hundred and sixty tons, and that it was consigned to the plaintiff.

The judge refused to permit counsel for the defendant to address the jury upon the questions whether reasonable care and diligence had been used by the defendant to guard the vessel against the consequences of the storm; and also whether the vessel where it was, was or was not a reasonably secure place to keep the coal. The court decided that there was no question of fact for the jury, except the amount of the plaintiff's damages, and the defendant took an exception.

The judge charged the jury that the bill of lading was some evidence of the amount of coal on board the vessel; that it appeared the vessel was heavily laden, and her tonnage at custom house weight, one hundred and thirty-four tons; and the jury were to determine upon the bill of lading, in connection with the evidence as to her being heavily laden and her tonnage, how much coal was on board. To this instruction the defendant took an exception. The plaintiff had a verdict. The exceptions were ordered to be heard in the first instance

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at general term, where judgment was rendered for the plaintiff, and the defendant appealed to this court

Aaron J. Vanderpool, for the appellant.

Horton H. Burlock, for the respondent.

SILDEN, J. There is no doubt that a sheriff, marshal, or other officer of like character, who takes property by virtue of legal process, is under some obligation to see to the protection of such property against injury or loss; but to what precise degree of care he is bound under the various circumstances which may attend such a taking, is not very well settled by authority. Judge STORY, in his work on Bailments, section 130, in respect to the liability of such an officer, says: "He would doubtless be responsible for gross negligence and fraud; but whether he would be responsible for ordinary negligence, does not appear to have been decided by any adjudged case; although as he is a bailee for a compensation, it *may be thought* that he *ought* to be bound, by the common rule in such cases, to ordinary diligence;" and he refers to the cases of *Jenner v. Jodiffe* (6 Johns., 9), and *Burke v. Trevitt* (1 Mason, 98).

It strikes me that this is stating the doctrine somewhat too faintly. A sheriff or marshal is not an agent voluntarily selected, but a public officer, whom the party is compelled to employ; one who is clothed with a public trust; chosen by the public for his supposed fitness for the discharge of important and responsible duties. He stands, moreover, between two opposing parties, being made by law the custodian of the property about which they are in some measure contending, and which may therefore justly be considered as exposed to some perils which would not attend a mere ordinary bailment. Under these circumstances, the doubt in my judgment is not whether the officer is bound to take ordinary care, but whether he ought not to be held to a somewhat higher degree of diligence.

But it is unnecessary to determine here the precise degree of negligence which would render a sheriff liable in an ordi-

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nary case where he removes the property from the possession of the defendant, and takes it entirely under his own charge; because, whatever rule may be adopted on this subject, if it is to be regarded as applicable to the present case, the question of negligence should, I am inclined to think, have been submitted to the jury. There are, no doubt, cases depending entirely upon questions of negligence, where the proof is so clear that the court is justified in assuming, as a matter of law, that the negligence is established. But questions of that nature are peculiarly appropriate for the consideration of a jury, and courts are very justly cautious about encroaching upon their province in this respect. That there was negligence somewhere in the present case, provided we assume that if the vessel had been removed during the storm to the south side of the pier, the disaster would probably have been avoided, is pretty certain. The man placed in charge by the sheriff was warned of the danger; but as his instructions, as construed by him, were limited to seeing that the vessel was not removed, he declined to interfere. There is a discrepancy between his testimony and that of the captain, upon the question whether he refused to permit the location of the vessel to be changed. The whole difficulty may have grown out of the want of specific instructions to the man to whom the matter was given in charge. If so, this would be a species of negligence for which the sheriff must be held responsible.

He is also, under the circumstances, responsible for any negligence or want of ordinary skill on the part either of the man employed to watch, or of the master of the schooner; for by leaving the coal in charge of the latter, without other control than that of a man to watch and see that the vessel was not removed, he necessarily made the master his agent, to see to the security of the coal in the place where it then was, and became, therefore, responsible for any negligence or want of skill on the part of the latter in taking care of the property. It would seem to follow that if the jury should believe that the vessel would not have sunk if she had been removed to the south side of the pier, and that due and proper care required, after

the storm arose, that she should have been so removed, the sheriff must be held responsible for the negligence which prevented the removal, whether it arose from a want of proper instructions, a misunderstanding of those instructions, or from any other cause.

But the plaintiff's counsel insists that the defendant is liable at all events, irrespective of the question of negligence. His position is, that it was the imperative duty of the sheriff to remove the coal immediately from the vessel, and take it exclusively into his own hands; that he had no right to leave it for any time under the control of the defendant in the suit; and that having done so he became absolutely responsible for its safety. The principal authority relied upon to support this position is the case of *Browning v. Hanford* (5 Hill, 588; *S. C. in Error*, 5 Denio, 586). That was a case of goods seized upon execution and left in the possession of the defendant; a receipt being taken from a third person, by which the latter agreed to deliver the goods upon demand, or pay their value. When the case was first before the Supreme Court (5 Hill, 588), it turned mainly upon the question as to the degree of responsibility assumed by the sheriff, in leaving the property in the possession of the defendant, after taking a receipt; and it was held by three of the justices—the other dissenting—that his responsibility was that of an ordinary bailee for hire. A new trial was granted upon that occasion, and the case afterwards came again before the Supreme Court (7 Hill, 120), where it was decided upon a single question, relating to the competency of the sheriff's return upon the execution as evidence in his own favor; a new trial being denied. The case was then carried to the Court of Errors (5 Denio, 586), where, in addition to the question as to the return, the court considered the question, passed upon by the Supreme Court when the case was before it upon the first occasion, as to the degree of responsibility resting, under the circumstances, upon the sheriff. Different opinions were expressed; but as it is difficult, if not impossible, to ascertain upon which of the two questions involved

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in the case the new trial was granted, nothing is settled by the decision as to the point under consideration here.

But, however that question may be ultimately settled, its decision does not, I think, control the present case. Assuming that in ordinary cases a sheriff, if he leave goods taken upon execution in the hands of the defendant, makes himself absolutely liable, and that his responsibility would generally be the same whether the goods be taken by virtue of mesne or final process, as to which I express no opinion, I nevertheless think, that under the peculiar circumstances of the present case, the sheriff did not make himself liable at all events, by omitting forthwith to remove the coal from the vessel. The sureties of the plaintiff had not justified, and until that was done he could not know that the plaintiff would entitle himself to the possession. The removal of the coal would have been attended with a heavy bill of expense; as he could not safely deliver it to the plaintiff until the sureties had justified, he would have had to procure a place to store it; and this would have involved the necessity of another removal, whether the coal had ultimately to be delivered to the plaintiff or returned to the defendant. It is true that as his process was only against the coal, and gave him no authority to seize the vessel, which must necessarily remain under the control of the master, the sheriff could not with any propriety have left the coal in the vessel without the consent, either express or implied, of such master. But I think the circumstances proved warrant the inference that the latter did tacitly consent that the coal should remain on board, and that his right to control the vessel should be subordinate to the rights acquired by the sheriff. The latter was, therefore, I think, justified in omitting to incur the great expense of removing the coal, until it should be definitely settled whether it was to be delivered to the plaintiff or not. We are brought therefore to the conclusion that it was incumbent upon the plaintiff to show some degree of negligence on the part of the sheriff, beyond the mere fact of omitting to remove the coal, and that the loss occurred in consequence of such

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negligence. It follows, if I am right in the view previously taken, as to the evidence upon the question of negligence, that the court erred in refusing to permit the defendant's counsel to address the jury and in giving positive instructions to the jury to find for the plaintiff.

But were it otherwise, the judgment must still be reversed for an error in the charge of the court in respect to the effect of the bill of lading as evidence. Whether this document may not have been admissible for some purpose, is a question which it is unnecessary in this case to decide. In the case of *Haddock v. Parry* (3 Taun., 808), which was an action upon a policy of insurance, the bill of lading which was offered in evidence, to show that the plaintiff had an insurable interest in the property, was rejected at *nisi prius*, by Sir JAMES MANSFIELD, Ch. J., before whom the cause was tried. But upon motion for a new trial, the Chief Justice thought the bill, might, under some circumstances, be evidence upon the question of title in the consignee, in a suit between him and a third party. The person who signed the bill of lading in that case was dead, and reliance was placed upon that fact. Mr. PHILIPS, however, seems to think such evidence admissible to prove title in the consignee; as I should infer from his language, without regard to the death of the person who signed the bill. (2 Phil. Ev., 37, 39.)

Such evidence can only be admissible, if at all, in connection with proof of possession, by the party signing the bill of lading.

It being unnecessary, however, to pass upon this question in the present case, I shall express no opinion upon it. Even if the evidence was improperly admitted upon the question of title, I should not think the error sufficient to reverse the judgment; for the reason, that it was wholly unnecessary for the plaintiff to give any evidence of title, beyond the fact that the defendant had taken the property in a suit in which he was plaintiff; it not appearing that any claim of title had been made on the part of any other person. The sheriff was responsible, *prima facie* at least, to the plaintiff, and he shows no responsibility to any other party.

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But whether the bill of lading was or was not properly admitted in evidence, upon the question of title, it clearly afforded no evidence whatever in regard to the quantity of the coal. If evidence on the question of title, it is because it goes to qualify what would otherwise be *prima facie* evidence of absolute ownership by the master of the vessel, viz.: the possession. But the bare possession of the master affords no evidence as to quantity; and hence the bill of lading in that respect is nothing more than his mere naked declaration, unconnected with anything which can give it force as against a third party. It is undoubtedly good as an admission to charge the master himself; but is of no more force as against third persons than any other declaration he might make bearing upon their rights.

The court charged the jury "that the bill of lading was *some* evidence of the amount of coal on board the vessel; that it appeared that the vessel was heavily laden, and her tonnage at custom house weight one hundred and thirty-four tons; and the jury were to determine *upon the bill of lading*, in connection with the evidence as to her being heavily laden, and her tonnage, how much coal was on board."

This part of the charge, which was excepted to, was very material. There was no other evidence of quantity in the case, except that here alluded to. Without the bill of lading, the jury would have been left on that subject entirely to the uncertain inference to be drawn from the capacity of the vessel.

The verdict was based undoubtedly upon the statement in the bill, and as that was clearly incompetent for that purpose, the judgment cannot be sustained.

Were it not for the necessity of reversing the judgment upon the point last considered, we should have felt bound to give to the facts a more critical examination; and might perhaps have come to the same conclusion with the Superior Court at general term, that the proof of negligence was so clear as to justify the court in taking the case altogether from the jury. Our conclusion, however, on that subject is, under the circumstances, of no controlling importance.

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The judgment must be reversed and there must be a new trial, with costs to abide the event.

All the judges concurred except COMSTOCK, Ch. J., who thought that the Superior Court was right in holding that the proof of negligence was too clear to leave any question for the jury. He was for reversal on the point last considered in the opinion of SELDEN, J.

Judgment reversed, and new trial ordered.

PURVIS v. COLEMAN & STETSON.

Personal notice to a guest at an inn that a safe is provided for keeping money, jewels, &c., and that the innkeeper will not be liable for their loss, unless given to him for deposit therein, is equivalent to the posting in the guest's room of a written or printed notice, under the statute (ch. 421 of 1855).

Independent of the statute, the leaving by the guest of \$2,000 in gold coin in his trunk in a room, with no person therein, in a hotel in the city of New York, after such actual notice, is such negligence as to discharge the innkeeper from any liability.

APPEAL from the Superior Court of the city of New York. Action to recover money abstracted from the plaintiff's trunk while a guest of the defendants. On the trial it was proved that the defendants were proprietors and keepers of an inn or hotel in the city of New York. On the 23d of January, 1856, they received the plaintiff as a guest. He was assigned a room in the house, and was escorted to it, with his baggage, by a waiter or porter of the defendants, in the early part of the day. About 5 o'clock, on the day of his arrival, the plaintiff left his room for dinner, locking his door, and leaving the key at the office of the hotel. On his return, at about 6 o'clock, he found his room had been broken into, his trunk broken open, and 400 sovereigns taken therefrom.

The jury, in answer to specific written interrogatories, found the following facts :

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1st. That the money sought to be recovered was in the plaintiff's trunk at the time it was broken open. 2d. That a printed notice that the defendant kept a safe, pursuant to the statute (Laws of 1855, chap. 421), in which guests at the hotel were required to deposit their valuables, was not posted up in the room assigned to the plaintiff at the time he took possession of it. 3d. That notice in fact was given to the plaintiff at the time of his arrival and occupancy of his room, of the provision by the defendants of a safe for the deposit of the valuables of the guests of the hotel, and that they would not be liable for the loss thereof, unless so deposited therein. 4th. That the plaintiff was guilty of negligence on his part, under the circumstances, in not availing himself of the notice given to him to deposit his valuables in the safe provided by the defendants for that purpose.

The jury assessed the damages of the plaintiff at \$2,058.

Upon this finding, a judgment was entered for the defendants at special term in the Superior Court, and was affirmed, on appeal, at the general term. The plaintiff appealed to this court.

John K. Porter, for the appellant.

John H. Reynolds, for the respondents.

DAVIES, J. At common law, the defendants were liable for all losses of the property of their guests *infra hospitium*. The legislature of this State, in 1855, for reasons which might easily be suggested, and which were satisfactory to them, modified this strict liability of the common law, which had been uniformly enforced by the courts with rigidity, and its application in many cases involved peculiar hardship.

The act of 1855 provides that whenever the proprietor of any hotel shall furnish a safe in the office of such hotel, or other convenient place, for the safe keeping of any money, jewels, or ornaments belonging to the guests of such hotel, and shall notify the guests thereof by posting a notice, stating the

fact that such safe is provided in which such money, jewels or ornaments may be deposited, in the room occupied by such guest, in a conspicuous manner, and such guest shall neglect to deposit such money, jewels, &c., in such safe, the proprietor of such hotel shall not be liable for any loss of such money, jewels, &c., sustained by such guest by theft or otherwise.

It is seen from an examination of this statute, that two things are to be done by the proprietor of the hotel to relieve himself from his common law liability :

1st. He is to provide a safe in his office or other convenient place in the hotel, for the safe keeping of the money, &c.

2d. He is to notify the guests thereof, by posting a notice in a conspicuous place in the room or rooms occupied by the guests, stating the fact that such safe was provided in which such money, &c., might be deposited.

There is no doubt that in this hotel the proprietors had provided the safe in their office for the safe keeping of the money of their guests. So far they had undeniably conformed to the statute.

The notice, by posting in the room, required by the statute, was not given, as found by the jury ; but the jury has found as a fact that this plaintiff had actual and full notice that such safe was provided for that purpose.

The actual notice given to the plaintiff was far more full and ample than the constructive one provided for in the act of the legislature. The notice to be posted by the act was only to state the fact that such safe was provided in which such money, &c., might be deposited. That was all the constructive notice the act required. It is easy to perceive that if such notice was brought to the attention of a stranger, he might well fail to perceive that there was anything in it changing or modifying the duties or liabilities of the proprietor, in respect to the safety of the property of his guest. He would see from this statutory notice, if he read it, that a safe was provided in which his money might be deposited, but it would fail to inform him of any consequences attending his not availing himself of its use. The notice actually given in the present case distinctly brought to his

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mind not only the fact of the safe being provided, but the reasons of such provision, and the important fact that if the guest did not avail himself of this place of safety for his money, in case of its loss, he could have no claim upon the proprietor of the hotel. The actual notice, therefore, given in this case, was far more satisfactory and ample than the constructive one required by the statute; and the question is, whether the defendants were protected by the act, in giving this notice and omitting to post that prescribed by the statute? There can be no controversy, that an actual notice is far more certain to bring knowledge of a fact to a party than constructive notice. We certainly must be permitted to look at the object of the legislature in passing this act, and in making the provision as to notice which it contains. It was certainly to limit the liability of hotel keepers and to provide means by which they might restrict it. It was also the object of the legislature to provide for the security of the guest, and not to deprive him of the rights secured to him by the common law without special notice of the provisions of this act. It must have been seen by the framers of the act, that it would have been a difficult matter in a large hotel, receiving three or four hundred guests daily, to give personal notice to each guest of the requirements of this act, and to preserve evidence of such notice. The legislature, therefore, in addition to the knowledge which every man is presumed to have of the law, thought proper to provide in this particular case, that the putting of a notice in a conspicuous place in the room occupied by the guest, stating the fact that a safe was provided in which his money might be deposited, should be *prima facie* evidence of notice to him of the act. The mode and manner of giving the notice was, therefore, clearly for the benefit of the hotel keeper. It is easily seen that the chances of its attracting the attention of the guests were small; and even if it did, and stated only what the act requires, it would fail to inform him of the advantage secured by the act, and the consequence which would follow in case he did not avail himself of the use of the safe.

We think, therefore, the actual notice given in this case

contained more full information than the statutory notice, and that the object and purpose of the act have been more than complied with. We do not see that the precise mode of giving the notice specified in the act, and in the precise form prescribed by it, are essential to the protection of the defendants. We must look at the substance of things, and not be led away by forms. Under our recording acts, the recording of a deed or mortgage is notice to all subsequent purchasers or incumbrances, but no principle is more familiar than that actual notice of a deed or mortgage unrecorded is quite as effective and far more satisfactory than record notice. One is constructive, the other actual. Previous to 1844, in proceedings to foreclose mortgages by advertisement, the notice of sale was required to be given by publication in a newspaper printed in the county, and by affixing a copy of such notice on the outer door of the court house of the county in which the lands to be sold were located. In *Stanton v. Chine* (1 Kern., 198), GARDINER, Ch. J., in delivering the opinion of this court, says: The publication in the newspaper and the posting on the court house door were the equivalents to a personal service. If so, it certainly follows that if personal service, on any person affected by the proceeding, had been made of the notice, it would have dispensed with proof of the statutory notice. We think that the actual notice given in the present case, afforded all the protection to the defendants which they would have had if the statutory notice had been posted as required by the act of 1855.

But we think there is another ground, equally satisfactory, upon which the judgment of the court below can be sustained. The jury have found as a fact in this case, that the plaintiff was himself guilty of negligence under the circumstances in not availing himself of the notice given to him, to deposit his valuables in the safe provided by the defendants.

The judge charged the jury "that if the information communicated to the plaintiff was communicated by the authority of the defendants, and was so communicated as that it was understood by the plaintiff so that he had full notice that there was a safe in the office appropriated to the safe custody of valuables,

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It was negligence, considering the amount of money he had, not to have intrusted it to the safe."

The jury, in finding that the plaintiff was guilty of negligence, must have found all the facts which the judge had told them were necessary to be proved to justify such a finding; and having ascertained the facts, they drew from them the exact conclusion which the judge had instructed them to draw. It follows, if it be the law that the loss of the plaintiff, having been caused by his own negligence, is a bar to his recovery, that in the present case such negligence having been established as a fact, he cannot recover.

It is said in *Cady's case* (8 Rep., 83), that if the innkeeper require his guest that he will put his goods in such a chamber under lock and key and then he will warrant them, otherwise not, and the guest lets them lie in an outer court, where they are taken away, the innkeeper shall not be charged, for the fault is in the guest. In *Richmond v. Smith* (8 Barn. & Cress., 10.) Lord TENTERDEN placed the liability of the innkeeper, upon the common law rule, that where a traveler brings goods to an inn the landlord is responsible for them. And he says, "if it had been intended by the defendant not to be responsible unless his guests chose to have their goods placed in their bedrooms or some other place selected by him, he should have said so." The Chief Justice deems the situation of the landlord precisely analogous to that of a carrier. BAYLEY, J., said that "an innkeeper's liability very closely resembles that of a carrier. He is *prima facie* liable for any loss not occasioned by the act of God, or the king's enemies, although he may be exonerated when the guest chooses to have the goods under his own care." These cases are cited with approbation by NELSON, Ch. J., in *Piper v. Manny* (21 Wend., 284). Applying these principles to the facts of the present case, where it is apparent that the defendants wished to have the plaintiff's money put in a place of safety, which he refused to permit, but chose to have it under his own care, the defendants are exonerated, and the plaintiff must suffer the consequences of his own folly.

Purvis v. Coleman & Stetson.

The ground of the defendants' liability has always been likened to that of a common carrier. The rules of law applicable to such a condition of parties have always been maintained with firmness by the courts, and certainly by those of this State. (*Dorr v. The New Jersey Steam Navigation Company*, 1 Kern., 485.) Yet it is also the well settled law of this State, that if the plaintiff's negligence has caused or contributed to the loss or injury, an action against the carrier cannot be maintained. (*Tonawanda Railroad Company v. Munger*, 5 Denio, 255; *S. C.*, 4 Comst., 349; *Shepherd v. Hees*, 12 Johns., 434; *Bush v. Brainerd*, 1 Cowen, 78; *Brownell v. Flagler*, 5 Hill, 282; *Cook v. Champlain Transportation Company*, 1 Denio, 99; *Haring v. New York and Erie Railroad Company*, 18 Barb., 9.)

It being an established fact in this case that the plaintiff was guilty of negligence in not availing himself of the place of safety provided by the defendants for the safe keeping of his money, it follows that he cannot maintain this action.

The judgment of the Superior Court should therefore be affirmed.

DENIO, SELDEN, BACON and WRIGHT, Js., concurred on both the grounds stated by DAVIES, J. COMSTOCK, Ch. J., CLERKE and WELLES, Js., did not agree that a verbal notice could be substituted for the posting of a written or printed one as required by the statute, but concurred on the ground that the plaintiff's negligence discharged the defendants independently of the statute.

Judgment affirmed.

Hammond v. Zehner.

HAMMOND v. ZEHNER.

The continued user, for more than twenty years, of an easement injurious to the land of another, *e. g.*, overflowing his land with water, authorizes the presumption of a grant.

It is for the party submitting to the user in such a case, to show that it was by license or permission, and not for the party exercising it to prove an express claim of right in order to characterize the use as adverse.

APPEAL from the Supreme Court. Action to recover damages for flowing lands of the plaintiff, by means of a dam erected by the defendant across the Canaseraga creek, in the county of Livingston. The defendant set up in his answer that the creek was a public highway, and that by an act of the Legislature, passed April 11th, 1820, one Isaac Havens was authorized to construct a dam across the creek, not to exceed three feet high, and that Havens accordingly constructed the dam complained of, which has been ever since continued; and that Havens, on the 5th July, 1831, being the owner in fee of the land on which the dam was erected, conveyed to the defendant, in fee, a grist mill, which was supplied with water by means of the dam, and its appurtenances, and leased him the land on which the dam and the race leading therefrom to the grist mill were constructed.

On the trial the defendant gave evidence tending to prove, in addition to the above mentioned facts, that the dam had been maintained and kept from the year 1826 to the commencement of the action in 1851, and that its effect during all that time was to flow the plaintiff's land, and render it unfit for cultivation. The plaintiff furnished no proof that the use of the dam, so far as his lands were affected by it, was by his permission or favor, or was in subordination to him; neither did the defendant give any other proof of adverse possession than what is afforded by the uninterrupted use of the dam for more than twenty years.

The counsel for the plaintiff, when the defendant's counsel offered to prove the facts above stated, objected, on the grounds

21	118
110	598

21	118
129	260

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132	297

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139	24

21	118
75 AD	187

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that, 1st. The continuance of the dam for more than twenty years conferred no right on the defendant to maintain it to the plaintiff's injury, and was no defence to the action; and 2d. That the answer of the defendant did not state facts sufficient to constitute a defence, because it alleged no right to flow the plaintiff's lands, nor did it set up a title inconsistent with the title of the plaintiff, or hostile to it; but, on the contrary, he maintained that the answer shows that the claim of the defendant was originally in subordination to the title of the plaintiff. The judge overruled the objection, to which the plaintiff's counsel excepted. After the testimony was closed, the counsel for the plaintiff requested the judge to charge the jury that if they were satisfied the dam caused the water to overflow and injure the lands of the plaintiff, he was entitled to recover his damages, notwithstanding the claim of right to flow the lands. The judge declined so to charge, to which the plaintiff's counsel excepted; but the judge charged that if the defendant and his grantor had used and occupied the premises, as they were, for twenty years before the commencement of the action, the jury might presume a grant from some person authorized to make one, and should find a verdict for the defendant; to which the plaintiff's counsel excepted. The defendant had a verdict and judgment, which having been affirmed at general term in the seventh district, the plaintiff appealed to this court.

John H. Reynolds, for the appellant.

Luther C. Peck, for the respondent.

CLERKE, J. The question is fairly presented, whether the uninterrupted use of the dam for twenty years was a sufficient defence, without any other manifestation of an adverse possession than the effect which it produced during that time on the plaintiff's land. In other words, will this uninterrupted use be presumptive proof of an adverse possession?

Undoubtedly, the object of the law in requiring that possession or user should be adverse, is that the person against

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whom the claim is made or the right is exercised, should be made aware of the fact so as to give him an opportunity of legally resisting before the time for doing so, limited by the statute, expires. Generally, mere possession or use would not be sufficient to arrest his attention, or to put him on inquiry. To effect this, it is necessary in many cases that the person in possession or exercising the use should give some additional indication that it was hostile to another's claim. It is a well established rule, therefore, that the doctrine of adverse possession is to be taken strictly, and not to be made out by inference, but by clear and positive proof. Every presumption, it is said, is in favor of possession, in subordination to the title of the true owner. The possession must be under claim and color of title, and exclusive of any other right. (*Jackson v. Sharp*, 9 Johns., 167, and cases cited in note a.)

But, on the other hand, it may be well asked, what manifestation of claim could the defendant employ other than the very act of which the plaintiff complains—the overflowing of a portion of his land so as to render it useless for cultivation or any other agricultural use. Or, if there were any other method in which his adverse claim could be indicated, other than the express verbal assertion of it, could any be more effectual for the purpose of inducing the plaintiff to assert his rights than the continual overflow of his lands for three and twenty years? It was in its very nature hostile to the rights of the plaintiff; it was an open and constant injury to him. The user was plainly wrongful—an invasion of his rights, for which he was entitled, at any time within the twenty years, to recover damages. An action for this purpose would be a sufficient vindication of the plaintiff's title, even if he recovered only nominal damages, and would remove every pretext for presuming a grant. In *Parker v. Foote* (19 Wend., 309), which was an action for stopping lights in a dwelling house, it was held, and clearly upon authority, if the user is wrongful—if it is a usurpation to any extent upon the rights of another, it is of itself adverse, and if acquiesced in for twenty years, a reasonable foundation is laid for presuming a grant. This was

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the substance of the judge's charge in the present case; and, as the plaintiff adduced no proof to show that the use was by his leave and favor, it was not necessary that it should be left to the jury to find an express and positive adverse use.

The judgment should be affirmed.

All the judges concurring,

Judgment affirmed.

GRIFFIN v. MARQUARDT.

The testimony of an assignor, in trust for creditors, that he made the assignment for the purpose of gaining time to pay his creditors and to protect his indorsers, though evidence, is not conclusive upon the question of a fraudulent intent to hinder and delay.

A direction to the trustee in the assignment to forthwith take possession of the property, and sell the same without delay, for the best price that can be procured, construed as meaning only that the assignee should sell without unnecessary or unreasonable delay, and not as such an absolute direction for a sale immediately, irrespective of the interest, of creditors as would remove the subject from the control of the courts, and thereby avoid the trust.

The assignee was directed to pay the amount of certain notes not yet due to the indorsers of the assignor thereupon, and not to the holders: *Held*, that the provision had no other effect than if the holders of the claims were named as the *cestui que trust*.

APPEAL from the Supreme Court. The case came up from a second trial ordered by this court (17 N. Y., 29). The trial was by the court without jury, and the judge held that there was no fraud in fact in the assignment which the plaintiff sought to impeach. He dismissed the complaint, and the judgment was affirmed at general term in the second district. The plaintiff appealed to this court, and argued that the assignment was invalid upon its face, and conclusively proved to be fraudulent.

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by testimony which sufficiently appears in the following opinion.

Amasa J. Parker, for the appellants.

Joseph Blunt, for the respondent.

WRIGHT, J. The plaintiff's complaint was dismissed at the special term; the judge holding that the assignment of Marquardt was not fraudulent. Upon the whole evidence, he found the assignment to have been made in good faith, and without any fraudulent intent, and as these were questions of fact purely, his finding is not open to review here. The question of fraud in fact was disposed of at the special and general terms, where alone it could be examined and reviewed. The plaintiff's counsel points us to a part of the testimony of the assignor, which it is claimed conclusively establishes a fact fatal to the assignment, and as matter of law, entitled the plaintiff to judgment. In the course of the examination of the assignor as a witness, the question was put to him: "Why did you make an assignment?" He answered, "I made the assignment for the purpose of gaining time to pay my creditors. * * * I wanted to protect my indorsers. I made the assignment to pay my debts." This testimony is singled out as establishing a fact that it is alleged neither was or could be controverted, viz.: that the assignment was made with the fraudulent intent to hinder and delay the assignor's creditors in the collection of their debts. There is no force in the suggestion. Had Marquardt testified unqualifiedly that his sole purpose in making the assignment was to gain time to pay his creditors, it would not have been testimony so conclusive in its nature as to have constrained the judge who tried the cause, regardless of all the other evidence in the case, to find against the *bona fides* of the assignment. The short answer is, that what we are pointed to was mere evidence addressed to the judge, establishing no fact conclusively, but to be weighed and considered with the other evidence in the case, in passing upon

and determining the question of an actual fraudulent intent. That it was the testimony of the assignor, gave no conclusive character to it in the establishment of a fact.

The only question open for discussion in this court is, whether there is anything in the deed of assignment itself which in judgment of law renders it invalid as against creditors. The property is conveyed to the assignee in trust to pay debts, and he is directed to "*forthwith take possession of the said premises, and sell the same without delay for the best price that can be procured.*" If this direction operated to vest any discretionary power in the assignee, not legally incident to his trust, nor to be, on the application of creditors, at all times controlled by the courts, it would be our duty to pronounce the assignment fraudulent. But it does not. The duty imposed by law on an assignee, is to proceed without unreasonable delay in the execution of the trust confided to him; and if he errs in this respect, in the exercise of the legal discretion incident to his trust, the courts may correct the error. All that the direction, fairly interpreted, means, is, that the assignee should proceed to sell and convert the assigned property into money, without unnecessary or unreasonable delay; and it cannot be construed into an attempt on the part of the assignor to exempt the assignee from his proper legal responsibility to those for whom he was to act.

Nor are the trusts to pay the indorsers or sureties of the assignor, the sums for which they were severally liable, invalid. It appears from the assignment itself that some of the indorsed notes were not due at the time the assignment was made and were held and owned by corporations or persons other than those to whom the money was directed to be paid. But these were trusts to pay the debts or obligations of the assignor, for which the indorsers or securities were severally liable, and there can be no doubt that the holders and owners of the claims designed to be protected, might compel an appropriation of the assigned property to their payment. This being so, the provision has the same effect as if the holders were named the *cestui que trust* in the instrument.

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There seems to be nothing in the provisions or trusts contained in the deed of assignment to characterize it as fraudulent, and the court below has found that there was no fraud in fact.

The judgment of the Supreme Court should be affirmed.

All the judges concurring,

Judgment affirmed.

DE GROFF v. AMERICAN LINEN THREAD COMPANY.

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171 *415

The defendant, a corporation organized for the purpose of manufacturing linen goods, sold to the plaintiff a stock of miscellaneous merchandise in a store belonging to it, upon the agreement that if the trustees then in office should, within a year, cease to have the management of the affairs of the company, and in consequence thereof the general trade of its operations should be diverted from such store to the plaintiff's damage, the defendant would rebate \$300 of the price of the goods or pay that sum to the plaintiff: *Held*,

The defendant, in the absence of contrary evidence, is to be presumed to have obtained the merchandise in exchange for its manufactures, in payment of debts or some other legitimate exercise of its corporate powers. The power to affix conditions in respect to the price is incident to the power of the corporation to sell the property, and the contract is therefore valid.

New trustees having been substituted within the year, the liability of the corporation is established by evidence of a diversion of the trade of its employees to the prejudice of the plaintiff, without any active interposition of such trustees to produce that result.

APPEAL from the Supreme Court. The complaint was that in January, 1853, the defendant, a manufacturing corporation organized under chapter 40 of 1843, having its place of business at Mechanicville, Saratoga county, owned goods and merchandise in a brick store at that place suitable for retailing and worth about \$2,500. The plaintiff purchased the goods, agreeing to pay for them \$3,200, in consideration of which

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agreement the defendant agreed that if its trustees then in office should, at any time within one year from March 1, 1853, cease to have the management of the affairs of the company and by reason thereof the general trade of the hands in the employment of the company should, in consequence thereof, be diverted from the brick store (where the plaintiff was to sell the goods) within the period above mentioned and the plaintiff should sustain damage thereby, then the defendant was to pay the plaintiff the sum of \$300, or discount that amount from any sum the plaintiff might be owing said company. Breach, that on the 28th April, 1853, a majority of the former trustees of the plaintiff ceased to have the management of its affairs; that in consequence thereof the trade of its hands was diverted from the plaintiff's store, whereby he sustained damage, and that the defendant refused to pay or account for the \$300.

Upon the trial the plaintiff proved a verbal agreement for the sale of the goods as stated in the complaint; the payment by him in cash and his negotiable promissory notes of \$3,200, and the execution by Vernam, Bennett and Farnham, three of the then trustees of the company, of a written agreement for the payment or deduction of \$300 in the terms stated in the complaint. Neither the defendant, president, nor secretary signed the agreement. There were two other trustees of the company who resided at a distance, and took no active part in its affairs. On the 28th April, 1853, Vernam, Bennett and Farnham resigned their offices of trustees, and three others were elected in their place, of whom Fellows, who kept a store at Mechanicville, was one. He was also appointed the treasurer of the company. The trade of the company's operatives was soon thereafter diverted from the plaintiff's store to that of Fellows. Evidence was received, under exception by the defendant, that Fellows, when paying the operatives, stated to them that the plaintiff had no interest in the company and that they would be expected to trade at the other store. There was evidence on the part of the defendant tending to show that no other of the trustees did or said anything to divert the operatives from trading with the plaintiff, but on the other hand it was under-

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stood by them that they were at liberty to trade where they pleased, and that the reason they abandoned the plaintiff's store was a rumor that he was unfair in his dealings with them. The defendant also proved specific facts tending to sustain the truth of the rumor. The questions raised by the defendant upon exceptions to the judge's refusal to nonsuit, and to his charge, sufficiently appear in the following opinion. The plaintiff had a verdict. A new trial was granted at general term in the fourth district, and the plaintiff appealed to this court, stipulating as required by the statute.

E. F. Bullard, for the appellant.

Augustus Bockes, for the respondent.

BACON, J. The order for a new trial, granted by the Supreme Court at general term in the fourth district, proceeds substantially upon two grounds: 1. That the contract entered into by the defendants with the plaintiff, out of which the cause of action arises, is void either as being *ultra vires*, or as contravening public policy; and 2. That if valid, a breach was not shown inasmuch as it was not proved that a diversion of trade from the plaintiff, against which it was intended to furnish an indemnity, was caused by the positive acts of the company. I think the court erred in both these conclusions.

If we concede that the business of buying and selling merchandise was not one of the purposes for which this company was organized, yet it will be rather difficult to predicate illegality of a transaction of this character, which for aught that appears was a single and isolated one. Their primary, and it may be added their legitimate, business was the manufacture of linen goods, and by the act under which they were organized they could purchase and hold and convey any real or personal estate necessary to enable them to carry on their transactions. The manufacturing of goods necessarily implied the power of disposing of them when manufactured, and if so, of receiving in payment money, or property readily convertible into money,

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or provisions or stores for the payment of their employees. How the goods which they sold to the plaintiff came into the hands of the company does not appear in the Case. They might, for aught that is affirmatively proved, have been in part, if not altogether, their own manufactured goods; or they might have been received in payment upon sales of such goods, or fallen into their hands as the only equivalent the company could obtain for debts due to them. It may be very true that the power to purchase, hold and convey personal estate does not confer upon this company an unlimited discretion as to the nature and extent of such transactions. But I am unable to see why the company may not lawfully have acquired the property in question in either of the modes above indicated. If, however, they acquired the goods in any such way as to make the transaction doubtful, as a question of power, what are the corporations to do with property thus forced in or forced upon their hands? Must they purge the illegality by giving the goods away, or destroying them, or may they not sell and transfer a good title to a purchaser? I think, beyond all doubt they may, and that the contract can be upheld and enforced on this ground.

But again, if it be conceded that the defendants had no power to enter into the contract of sale in this case and bind the company to perform the obligations assumed, viewed as a mere question of corporate power, yet having undertaken to do so, and having received the full consideration agreed to be paid by the plaintiff, and he having fulfilled his entire contract, they cannot now be permitted to set up that excess of authority to excuse them from that part of the contract which imposes an obligation upon them. It is very clear that if the plaintiff in this suit had been prosecuted upon one of the notes given by him upon the purchase, he could not, having accepted and retaining the goods, have set up as a defence want of power in the defendants to enter into the contract. The same rule of right and the same measure of justice will be exacted in this suit. This principle has been repeatedly held as applicable to an individual attempting to screen himself from liability

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when contracting with a corporation, and in the case of a corporation when seeking to escape responsibility on the plea of *ultra vires* for acts deliberately done with all usual and needful formalities; and where they have received the entire benefit they contracted for, such a defence should no longer be tolerated in our courts. In principle it is condemned by the decision in *Tracy v. Talmadge* (4 Kern., 162), although I admit this precise question is not presented in that case. Where the question is merely as to the capacity to contract, a party who has had the benefit of the contract should not be permitted, especially where there is no unlawful intent charged upon the other party, and he is in no sense *in pari delicto*, to question its validity. To deny relief to a plaintiff thus situated, would be substantially to secure to the party deliberately violating one of the laws of its existence, and where no guilty complicity can be charged upon the other party, the fruits of an illegal transaction, and operate as a premium upon repudiation and fraud.

The agreement in this case is in its true scope and object purely a contract for the sale of goods. It is very clear that in contemplation of the benefits the plaintiff expected to derive from the trade of the employees of the defendants, he had engaged to pay a large price for the stock, and in case this expectation should be disappointed by the contingency expressed in the contract, the defendants engaged, in substance, to deduct the \$800 from the purchase price. The agreement to pay back was only to provide for the event that the whole purchase money should be paid, or no part of the securities given should remain in the hands of the defendants when the time should arrive for the deduction to be made. Precisely this state of things did occur. A majority of the trustees, and those who had made the contract, went out of office within the ensuing year; the moneys paid by the plaintiff, and the notes he gave upon the purchase, were all used or negotiated by the defendants, and they retained no obligation on his behalf. The trade of the plaintiff, as alleged and proved on the trial, largely declined. It is conceded by the court below, in the opinion granting a new trial, that if the sale had been upon condition that the

purchaser was not to pay the last \$300, except upon the terms mentioned in the instrument of sale, and a breach had occurred within its provisions, the collection of the \$300 could not be enforced. Or, to state the same proposition in another form, if the company had retained one of the plaintiff's notes until it had become due, and had brought an action upon it, the defendant in such suit could unquestionably have set off the \$300 thus provided for in the contract. If so, why should the law refuse him the same remedy arising out of the same facts, when he seeks it affirmatively—any other remedy being denied him by the act of the defendants in putting his obligations beyond the reach of a defence?

Upon the other proposition, to wit: that the plaintiff could only recover by showing that the trade was diverted by the acts of the trustees of the corporation, I think the court also erred. Such is not the reading of the contract, nor is there anything in or out of it that would authorize us to say that such was the intent of the parties. It provided that if the then trustees should, within a year from the first of March following its date, cease to have the management of the affairs of the company, and in consequence thereof the general trade of the hands of the company should be diverted from the plaintiff's store, and he should sustain damage thereby, then the \$300 was to be paid to the plaintiff, or deducted from the amount he might be owing to the company. Now, all the plaintiff had to show to entitle himself to recover, was (1) a change in the administration of the affairs of the company, as provided in the contract; (2) that by reason thereof his general trade was diverted, and (3) that he had sustained damages thereby. To these points his proof was directed. It was not necessary, in establishing the second link in this chain, to prove that the new trustees, by active personal effort, affected the change in the trade. It was enough, if the proof tended to show to the satisfaction of the jury that this result followed as a sequence upon the change of trustees and the fact that those then in power ceased to have the management within the period prescribed by the contract. And this view of the con-

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tract answers the objections made to the statements of Fellows concerning the trade at plaintiff's store. It was competent upon the question of fact as to the falling off in the plaintiff's trade and the causes to which it was to be attributed, and was of the same class and character of much that was admitted upon the other side to raise the presumption that the diversion of the trade was owing to other causes and influences.

This also is an answer to the suggestion in the defendants' points (although no such ground is taken in the opinion of the court) that the contract is against public policy, inasmuch as it bound the company under a penalty to continue the then trustees in office. This seems to me a strained and violent construction to put upon a contract, the whole purport and scope of which was simply to provide that the plaintiff should have a reasonable indemnity upon the occurrence of a state of facts which might easily happen, and which occurring, might be calculated to, as it really did, have a prejudicial effect upon his interests, and diminish the value of his purchase. At all events, this clause in the agreement produced no such apprehended result, since the very trustees who executed it went out of office by their voluntary resignation within three months after its execution.

The contract was well executed on the part of the trustees. Their duty was to transact the business of the company; and, besides, the contract was treated as valid and binding by the corporation, and they received and applied to their own corporate uses the entire consideration obtained from the plaintiff upon the sale. The 8th by-law, referred to by the counsel, merely provides that contracts signed by the president and secretary shall be of binding force, and excludes no other mode by which a contract may be manifested or recognized.

If, then, the contract is one that the defendants could lawfully make, or one whose obligations, under the circumstances disclosed in this case, they are not permitted to repudiate, and the proper construction is the one we have placed upon it, and which on the trial at the circuit was maintained, it follows that

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no error was committed which requires this cause to be sent back for a re-trial.

The judgment of the general term should be reversed, and that at the circuit affirmed, with costs of the court below and of the appeal.

COMSTOCK, Ch. J., concurred fully in the preceding opinion; the other judges who concurred did so on the ground first stated in the opinion of BACON, J., reserving the question whether, if the contract were *ultra vires*, the plaintiff could maintain an action upon it because the defendant had received and retained the consideration; DENIO, J., dissented, and WRIGHT, J., expressed no opinion.

Judgment reversed, and judgment for plaintiff.

DUNHAM & DIMON v. WHITEHEAD *et al.*

An assignment by a debtor to a creditor of all his personal property and choses in action, for the payment of the debt, with a provision for a return of the surplus, is in effect a mortgage, and not void under the statute of trusts, as for the use of the person making it.

Distinction stated between a trust where the whole title vests in the trustee, and a transfer under which the debtor retains a residuary interest, which remains subject to the action of creditors.

Such an assignment by an insolvent, held valid, there being no extrinsic evidence of intent to hinder or defraud.

APPEAL from the Supreme Court. The plaintiffs, judgment creditors whose execution had been returned unsatisfied, of Hare and Pugh, brought an action in the nature of a creditor's bill against them and one Whitehead, to whom Hare and Pugh had assigned all their property. The trial was before Mr. Justice ROOSEVELT, without jury. He found these facts: Pugh and Hare were in business as iron founders, and being indebted to Whitehead for \$4,028, gave him, on the 19th November, 1851, their note for that sum and a chattel mortgage

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on the stock and materials in their foundry as security for its payment. On the 25th November, 1851, they transferred to him a policy of insurance on the mortgaged chattels, and confessed a judgment to him upon the note before mentioned. On the 5th December, 1851, they executed to him a deed of assignment, transferring to him all their notes, accounts and choses in action, of every description, to secure their debt to him; "and all the money which said Whitehead shall realize out of the effects hereby transferred shall be applied to the payment of said debt, and the surplus, if any, shall be paid to said Hare and Pugh." By force of the chattel mortgage, transfers and deed of assignment, all the property, credits and effects of Pugh and Hare were conveyed to Whitehead while they were in failing circumstances. The judge found, as matter of fact, that the several instruments of transfer were not made for the purpose of delaying, hindering or defrauding the plaintiffs, and as a conclusion of law, that they were not void. The judgment entered, upon his direction, in favor of the defendants having been affirmed at general term in the first district, the plaintiffs appealed to this court.

Charles H. Hunt, for the appellants.

Allan Melville, for the respondents.

WELLES, J. This, it seems to me, is a clear case for the defendant. The assignment from Hare and Pugh to Whitehead, dated December 5, 1851, was in the nature of a chattel mortgage, by which the latter acquired a lien, to the extent of his demand against the former, upon the property and choses in action assigned. It cannot be distinguished in principle from *Leitch v. Holliester* (4 Comst., 211). It is claimed by the plaintiffs that this case is unlike that, inasmuch as the instrument in this embraces and transfers all the assignors' property and things in action; whereas that conveyed only a single thing—a chose in action. But it is not perceived how that circumstance can affect the principle. In *Leitch v. Holliester* the assignment was given

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expressly to secure the demands of several creditors of the assignor who were his assignees, and provided for the return to the assignor of any surplus which might remain after the payment of those debts. In the present case the assignment does no more. It expressly states that it is made to secure the debt which Hare and Pugh owed Whitehead, and provides for the return of any surplus to Hare and Pugh. In neither case did the assignment create a trust within the meaning of the statute, which declares "that all conveyances, transfers or assignments of goods or things in action made in trust for the use of the person making the same, shall be void against creditors existing or subsequent. (2 R. S., 135, § 1.) Whatever idea of trust the nature of the transaction necessarily implied, such trust was incidental, and no part of the object of the instrument.

The distinction in such cases is between a conveyance in trust in the strict and proper sense of the term, where the trustee acquires the entire title to the subject matter of the trust, and where the trust can only be enforced or controlled in equity, and a case where a creditor can at once proceed and sell the residuary interest or equity of redemption of the assignor, if the thing assigned be property which may be sold on execution, or, if not, where he may reach that interest by a bill or action in equity in the nature of a creditor's bill—the same as if it never had been assigned—subject only to the lien created by the assignment.

A mortgage upon all of the debtor's goods and things in action would be valid beyond a doubt. This in effect was nothing more. The question presented to us is simply upon the validity of the instrument upon its face; and we think it free from the criticism applied to it.

There being nothing in the case to impeach the *bona fides* of the transactions between the defendant, Whitehead, and his debtors, Hare and Pugh, we think the judgment of the Supreme Court should be affirmed.

All the judges concurring,

Judgment affirmed.

Costigan v. Cuyler.

COSTIGAN v. CUYLER *et al.*

Where a judge acts as trior upon the challenge of a juror to the favor, his rejection, as immaterial, of evidence offered in support of the challenge cannot be reviewed.

APPEAL from the Supreme Court. Action for libel. On the trial the first juror called was challenged by the plaintiff to the favor. It was agreed that the challenge should be tried by the judge in the same manner as if triors were duly appointed for that purpose. The juror being sworn, testified that he was not acquainted with either of the parties. The plaintiff's counsel then offered to prove that the juror challenged was a member of a society called Know Nothings; that the defendants were members of the same society; that the plaintiff was a Catholic, and by birth an Irishman; and that the rules and regulations of the society called Know Nothings inculcated hostility to all Irish Catholics. The judge decided that the evidence was immaterial, and excluded it. The plaintiff took an exception. The juror was sworn. A verdict was rendered for the defendants. The exception was ordered to be heard in the first instance, at general term in the third district, where a new trial was refused and judgment was rendered for the defendants. The plaintiff appealed to this court.

Lyman Tremain, for the appellant.

John K. Porter, for the respondents.

COMSTOCK, Ch. J. The juror being challenged for favor, was asked, as a witness on the trial of that challenge, whether he was a member of the society of "Know Nothings." The question, considered by itself, of course amounted to nothing. To show its pertinency the plaintiff offered to prove the other facts mentioned in the bill of exceptions, to wit: that the

plaintiff was a Catholic and an Irishman; that the defendants were members of the same society of "Know Nothings" with the juror; and that the rules of that society inculcated hostility to all Irish Catholics. It had been agreed that the challenge should be tried by the judge without other triors. If triors had been appointed in the usual way, their decision in favor of the juror's impartiality, if the evidence offered had been submitted to them, would have been final. This is admitted. If the judge himself, after receiving the same evidence, had passed upon it in the same manner, his decision also would have been final. This is in substance precisely what was done. The judge assumed the facts to be as they were offered in evidence. He held they were immaterial, and rejected the offer; thus determining that those facts did not make out a case of favor which disqualified the juror. It manifestly was of no importance to the plaintiff whether this determination should be made after receiving the testimony, or at the threshold when it was offered. The insufficiency of the testimony to disqualify the juror was the point adjudged. The plaintiff has no right to complain that the judge refused to consume the time of his court in hearing the proof of facts, which, as soon as proved, he would decide were of no avail.

It is quite manifest, from what took place at the trial, that the facts stated, offered in connection with the particular question objected to, constituted the plaintiff's whole case upon the trial of the challenge. There is no room, therefore, for the argument, which has been pressed, that those facts were pertinent and should have been received in connection with others that were not mentioned in the offer. The plaintiff asked a question, and on objection being made, he stated all the connected facts which he proposed to prove. The truth of the whole of them was assumed, and on that assumption a decision was in substance made that the juror was impartial. If this be the correct version of the case, and we think it is, then it is conceded that the determination cannot be reviewed. It becomes unnecessary, therefore, to consider whether the evidence offered had a tendency to make out a case of partiality

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in the juror, so that the judge would have been bound to receive and submit it to the triors, if a jury of triors had been sworn.

CLERKE, J., dissented; all the other judges concurring,

Judgment affirmed.

BANGS, Receiver, &c., v. SKIDMORE.

The words "term of insurance," in section 6 of the act to incorporate the Jefferson County Mutual Insurance Company (ch. 41, of 1836), mean the term of time for which by the policy the insurance was to continue.

One insured in a company subject to the provisions of that act, continues liable to assessment upon his premium note for any losses incurred during the term specified in his policy, although his property insured be destroyed long previous to its expiration.

APPEAL from the Supreme Court. Action to recover the amount of a promissory note made by the defendant. Upon the trial before Mr. Justice THERON R. STRONG, a jury having been waived, these facts appeared:

The Genesee Mutual Insurance Company, which the plaintiff represented as receiver, was incorporated in 1836 by an act of the Legislature, which conferred upon it the powers and subjected it to the provisions of the charter of the Jefferson County Mutual Insurance Company, incorporated at the same session. (Laws 1836, chs. 41 and 241.) The defendant became a member of the company by procuring a policy of insurance on his saw mill for the period of five years, and giving his premium note for \$420, payable "in such portions and at such time or times as the directors of said company may, agreeably to their act of incorporation, require." About five months after the date of the policy, the saw mill was totally destroyed by fire, upon which the company paid him the amount insured, deducting his proportion of all losses and incidental expenses

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which had accrued or been incurred up to that time. After this, losses by fire occurred upon property insured by the company, on account of which assessments were made on the premium notes, including the one which the defendant had given; he being charged with \$189.78 as his proportion of those losses. Having neglected to pay the assessment, this action was brought on the premium note. The defendant insisted that his membership in the company, and his liability for any losses incurred, ceased when his saw mill was burnt, and payment was made to him upon his policy; but the judge held, under exception by the defendant, that he continued liable to contribute to the losses happening after the burning of his own property and the payment of the insurance money mentioned in his policy, and judgment was rendered against him for the balance of the note. The judgment having been affirmed at general term in the seventh district, the defendant appealed to this court. The cause was submitted on printed arguments.

Henry R. Selden, for the appellant.

H. F. Hatch, for the respondent.

WELLES, J. By section 3, of the act of 1836 (ch. 241) incorporating the Genesee Mutual Insurance Company, it was declared that the corporation thereby created should possess all the powers and privileges, and be subject to all the restrictions and limitations which were granted to and imposed upon "The Jefferson County Mutual Insurance Company," by the act incorporating that company, passed March 8th, 1836. (Id., ch. 41.) By the 2d section of the last mentioned act, all persons who should thereafter insure with the corporation should thereby become members thereof during the period they should remain so insured, and no longer.

The 8th section of the same act provides that every member of the company shall be bound to pay for losses, &c., in proportion to the deposit note. The section then declares that the buildings insured, and the right, title and interest of the assured

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to the land on which they stand, shall be pledged to the company; which shall have a lien thereon in the nature of a mortgage to the amount of the deposit note, which shall continue during his policy; such lien to take effect whenever the company shall file, and shall have entered, &c., a memorandum of the name of the individual insured, a description of the property, the amount of the deposit note, and the term for which the policy shall continue.

The position taken by the appellant is, that upon the destruction of the insured property, and the payment by the company of the insurance, he no longer remained a member of the company, or liable to contribute to any losses, &c., that might thereafter occur, although the time for which the policy issued had not expired.

The substance of the argument is, that when the property was destroyed the risk was at an end, and with it the relation of assurers and assured between the parties; and that upon the termination of such relation, the defendant, by force of the 2d section of the act, ceased to be a member of the corporation; and as by the 8th section, none but members of corporations are liable to pay for losses, the appellant is not liable for losses arising after he so ceased to be a member of the company.

Upon a careful examination and consideration, however, of the foregoing, with other sections of the act, I am satisfied that such was not the intention of the Legislature.

In the first place, it should be remembered that by the express terms of this contract of insurance, the liability of the parties was continuous, running through five years; that of the plaintiff was onerous upon them, in proportion to the time during which the policy by its terms was to continue. Upon the general principles of insurance, they could afford to take the risk for one year only at just one-fifth of the premium that they could afford to take it for five years, and in the same proportion for a longer or shorter period. There may be considerations which would justify taking risks for long periods at premiums less in proportion than for short periods; such, for example, as getting a larger amount of capital pledged in depo-

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sit notes, securing the patronage of the assured for a longer period, saving the expense of new policies, &c.; but none which affect the principle stated. The actual risk, as a general rule, is increased upon a given piece of property exactly in proportion to the time it is to continue. In this respect there is no difference between mutual insurance and stock companies. It would, therefore, be manifestly unequal and inequitable to release the defendant from his engagement before the expiration of the time for which, by the terms of his undertaking, it was to continue, because the contingency has happened which was to render absolute the plaintiff's liability to the utmost extent which the contract contemplated. It would be, in effect, to release the defendant from a portion of his obligation, when the whole of it was the consideration of the plaintiff's engagement, because the latter have performed to the last extremity the whole obligation to which, by the terms in their contract, they could in any event be subjected. The injustice of such construction is illustrated by supposing a company to consist of one hundred members, each of whom has an insurance of \$1,000 for five years, all taken at the same time, and each having given a deposit note for \$1,000. A total loss happens to one of the members at the end of one week from the commencement of the five years. The members pay this loss by a contribution of \$10 each. Immediately afterwards another member sustained a total loss, which, according to the defendant's argument, must be paid by the remaining ninety-nine members: Suppose like losses continue to occur at short intervals until they amount in the aggregate to a sum sufficient to exhaust the whole amount of deposit notes, which, on the principle contended for, remained in force. A computation will demonstrate that when sixty-four such losses should be paid, to say nothing of expenses, the whole capital of \$100,000, being the total amount of the original deposit notes, would be used up, and the policies of the remaining thirty-six members be entirely worthless.

The case supposed is a strong and plain one, but it shows the working of the rule contended for more or less palpably

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in every case, and exhibits a scheme anything but mutual or equitable.

If it should be said that the 11th section of the act contains provisions for the payment of losses after the amount collected on the deposit notes is exhausted, the answer is, in the first place, that such provisions are liable to be entirely inadequate, and would always be found less prompt and advantageous to the sufferer than a direct resort to the capital secured by the deposit notes.

But in the second place, the conclusive answer is, that the assessment thereby authorized is to be on the members of the company, who, according to the defendant's argument, are only those who remain insured, and do not include such persons as have sustained total losses. But the act under which this company was incorporated, upon a fair interpretation and a comparison of its several sections, will not be found to lead to any such unreasonable result as, it seems to me, the defendant's position tends to establish.

By section 6, every person becoming a member of the corporation, by effecting insurance therein, shall, before he receives his policy, deposit his promissory note for such sum as the directors shall determine; a part, not exceeding five per cent thereof, to be immediately paid, and the remainder of the note shall be payable in part or in whole at any time when the directors shall deem the same requisite for the payment of losses by fire, and such incidental expenses as shall be necessary for transacting the business of the company; and at the expiration of the term of insurance, the said note, or such part of the same as shall remain unpaid after deducting all losses and expenses occurring during said term, shall be given up to the maker thereof.

The words "term of insurance" evidently refer to the term of time for which, by the policy, the insurance should continue. They will certainly bear such construction without violating their ordinary and popular sense, and it is what I have no doubt the Legislature intended.

The 7th and 11th sections contain provisions by which persons insured might terminate their liability to contribute to the

payment of losses before the expiration of the time for which they were insured. By section 7 it may be done by alienating the property insured, and by section 11, by payment of the whole of the deposit note, and surrendering the policy before any subsequent loss or expense has occurred. There is nothing else to be found in the act providing for or contemplating the termination of the liability of a member or person who becomes insured, prior to the expiration of the time for which, by the terms of his policy, the insurance is to continue. This circumstance adds force to the argument in favor of the continued liability of a member during the whole time for which he became insured.

In this and most, if not all, mutual insurance companies, every person insured becomes a corporator, with stock in the corporation to the amount of his deposit notes. These notes constitute the capital stock of the company, upon which it relies for the payment of losses and expenses; and the members have no right to withdraw themselves or the stock thus held by them from the company, before the time for that purpose provided in the contract of insurance, except in the two cases provided in sections 7 and 11 before referred to.

By the 10th section of the act under consideration, if a member neglects the payment of one assessment for thirty days after notice, the directors may sue for and recover the whole amount of his deposit note or notes with costs; and the amount thus collected shall remain in the treasury of the company, subject to the payment of such losses and expenses as have or may thereafter accrue; and the balance, if any remain, shall be returned to the party from whom it was collected, on demand, after thirty days from the expiration of the time for which the insurance was made. These provisions are inconsistent with the idea of a termination of the liability of the maker of a deposit note, upon a total loss being sustained by him.

By the defendant's theory, the individual the whole amount of whose deposit note had been collected under the above 10th section, should be entitled to have his money thus collected, or

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such part of it as was not applicable to the payment of losses and expenses then accrued, refunded, whenever the property embraced in his policy should be totally destroyed. But that would be a plain violation of the section last referred to.

The case of *Wilson v. The Trumbull Mutual Fire Insurance Company* (7 Harris Pa. R., 872), is cited and relied upon by the appellant's counsel, as an authority in support of his position. That case may have been well decided, if the defendants' charter contained a provision similar to that embraced in the 7th section of the act under which the company represented by the plaintiff was incorporated, in relation to alienating the insured property. In the case referred to, the assured had sold the property insured before the loss happened for which he was assessed, which, the court held, dissolved his relation with the company as a member, and consequently terminated his responsibility on his deposit note. It will be perceived, therefore, that it is not applicable to the present case.

The foregoing are among the considerations which have led me to the conclusion, that by a fair and correct interpretation of the 2d section of the act, persons insured in the company respectively remain members of the corporation during the time their policies, by their terms, are to continue, and that such membership is not terminated by a total loss of the property insured. Such construction is no violation of the terms of the section; is necessary to avoid inconsistency with other sections, and is in harmony with the scope and spirit of the whole act.

I am, therefore, of the opinion that the judgment appealed from should be affirmed.

COMSTOCK, Ch. J., SELDEN, DAVIES, CLERKE, WRIGHT and BACON, Js., concurred.

DENIO, J. (Dissenting.) I am of opinion that this judgment cannot be sustained, either upon general principles or according to the provisions of the act. The theory of mutual insurance is, that the individuals who associate, and those who from

time to time join them, enter into an arrangement by which each member is insured to the amount specified in his policy, upon the property referred to in it, and becomes at the same time an insurer of each of the other associates, by binding himself to contribute towards making good any losses which they may sustain, in proportion to the amount of his own insurance. The relations which the members sustain towards each other is a reciprocal one, and it is that feature which creates the mutuality which distinguishes this arrangement from other contracts of insurance. It follows, that if for any cause one of the persons so associating ceases to be an insured party, he from that time ceases to be a party to the mutual arrangement. When he has no longer any property to be protected by the contributions of the other members, the consideration upon which he agreed to contribute for their protection is wanting; the relations upon which the parties associated have ceased to exist, and hence the obligations incurred become inapplicable and inoperative; the vital principle of the arrangement is gone, and can only be revived by a new insurance, by which he shall be again made a party to the association. It is not material whether he has ceased to be an insured party on account of having disposed of the property in respect to which he was insured, or because the property has been destroyed, so that the provisions of the contract of indemnity cannot attach to it. And in case of the destruction of the property, it is of no moment whether the loss was occasioned by the happening of the peril insured against, or by any other cause. If the property is in any way annihilated, so as not to be any longer the subject of an insurance, the contract which provided an indemnity to the owner against its destruction has ceased to have any element to support it, and can no longer exist. This precise point has been determined by the Supreme Court of Pennsylvania. In *Wilson v. The Trumbull Mutual Insurance Company* (7 Harris, 372), that court held that the interest in the property insured was an essential link in the relation of mutual insurance, and therefore, that when a member of a mutual insurance company, whose stock of goods was insured, sold them

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several months before a loss by fire happened, he was not liable for a portion of the loss, though it happened during the time for which he was insured. The court was of opinion that when the defendant sold his property he ceased to be a member of the company, and that the assessment could only be upon those who were members at the time the loss happened. "If," the court said, "a member perform all his duties, and pay a share of all losses occurring during his membership, no more can justly be required of him." His premium note, they added, cannot be used to enforce contributions for losses occurring after he ceased to be insurer or insured. A contrary view would lead to results entirely inconsistent with any notion of mutual insurance. Upon the plaintiff's argument, the defendant continued liable on his note for all losses which might happen before the expiration of the time for which he was originally insured. The period would extend more than four years from the time when, by the destruction of his buildings and the payment of his loss, he had ceased to have any interest in the company as an assured party. Thenceforward his only connection with it would be that of a guarantor of its contracts. He would be liable not only on its engagements made while he was an assured party, for which there would be a show of reason, but to all such as it might make after he had ceased to be insured. As to such cases, he would be a guarantor of parties with whom he was in no kind of privity, and against whom he could not in any possible event have any resort for any purpose. In the opinion of the Supreme Court, it is suggested that the premium notes are the capital stock of the companies, and that the makers have not in general any more right to withdraw them than the shareholders in a stock company have to withdraw the moneys they have invested in the stock. This argument, I think, proceeds upon an erroneous view of the nature of these associations. They have not, in fact or in theory, any capital stock. Although the engagements which the members enter into are in the form of notes, they are in substance and effect only guaranties that the makers will contribute to the losses of

the other associates, and the expenses of the business, in certain proportions. If no losses happen, nothing can be collected on the notes except a portion of the expenses, and if the expenses are met by the amounts required to be paid down, nothing whatever can be collected. They are continuing guaranties, that is, they continue to operate against the makers as long as those makers continue to hold such relations to the other associates as will enable them to resort, in the event of a loss, to the reciprocal guaranties given by the others. It is further suggested, in the opinion of the Supreme Court, that the amount of the note of a person taking out a policy is proportioned to the time it has to run; the risk assumed being, it is said, proportional to the time it is to continue; and hence it is argued that it would be inequitable that the note should be retired before the whole time the insurance was to run has expired, whatever may become of the property. This argument, I think, supposes that the artificial person, the corporation, represents interests other than those of the policy holders; but there is no such interest in a mutual company. The bargain which each member makes is with the other members, and not with any other party supposed to be represented by the corporate name. It cannot be correct to apportion the amount of the premium note according to the length of time covered by the insurance. Assessments for losses are always to be in proportion to the amount of the premium note. Now, suppose A is insured for \$1,000 for five years, and B for an equal sum for one year. If B give a note for \$100, A must give one for \$500. If during the year a loss happen to another insured party, A must of course pay five times as much as B. If B take out a policy on his property each year, and give only the note for \$100 on each occasion, which is all that could be required of him, through the five years covered by A's policy, the latter will have to contribute in the same proportion for all the losses during that time. This, of course, would be a very unequal arrangement, and would render it very hazardous to insure for a long period. Nor would it be quite equitable in certain contingencies to have the notes upon policies for long

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and short periods of the same amount; for if we again take the case of insurance from year to year for five years, and a single policy for the same length of time, and a note of equal amount given by each, if losses should occur in each year during the five years, the party holding the long policy might pay up his note before his policy expired, while the one giving a fresh note each year might still continue liable though the other would be wholly exempt. The only way in which equality in this respect can be worked out under this system, would be to have all the policies made to run for the same period, and to have the premium notes always proportional to the amount insured and to the nature of the risk.

If we take up the charter of this company, we shall see the principles, which have been stated, very plainly laid down. In the first place, it is declared that all persons who shall insure with the corporation, and their representatives and assigns continuing to be insured, "shall thereby become members thereof during the time they shall remain insured, *and no longer.*" (Act, § 2.) Then all the other provisions prescribing the relations between the parties and the corporation and their respective rights and liabilities, refer to them as members. Thus: This company is to be managed by thirteen members, who are to constitute a board of directors (§ 3). The directors are to be chosen by the members (§ 4). The mode of becoming a member is by taking out a policy of insurance, and there is no other way of acquiring the position of a member (§ 6). Every member shall be bound to pay for losses and necessary expenses, in proportion to the amount of his deposit note (§ 8). Suits may be maintained by the corporation against the members for their notes, and by the members against the corporation for losses by fire (§ 9). Assessments for losses are to be made against the members (§ 10). And after the notes are exhausted, the members may be further assessed to the amount of one per cent on their notes. It would seem that the Legislature were very careful to determine in the outset that none should be members who were not at the same time insured persons; and having in that manner given a precise idea of the nature

of membership, they so arranged all the other provisions as to affect the members and no other parties. Unless it can be said that a person who has insured his property in this company, and, after its total destruction by fire, has received his insurance money, still remains insured by the company on the very same property, it is impossible to hold that the defendant was a member at the time the loss occurred with which he is sought to be charged; and if not a member at that time, it is equally impossible to hold him to be a contributor towards that loss.

The provisions of the 7th section, which allow members to receive back their deposit notes upon aliening the property insured, and surrendering the policy, is a further evidence that the nature of the system is such as I have supposed. If the notes were in the nature of capital, as the Supreme Court has suggested, every member would be interested in it, and it would be unjust that it should be withdrawn when the maker should choose to dispose of the property. But this privilege of withdrawing a note, under such circumstances, is quite consistent with the idea that it is a guaranty, to continue so long as the maker shall be in a situation which will enable him, in the event of a loss by fire, to be benefited by the other similar guaranties.

Again, by the provisions of section 8, a lien in the nature of a mortgage is created against any building insured and the interest of the assured in the land on which it stands, for the amount of the deposit note, to take effect when the company shall cause the policy to be entered in the book of mortgages. If the plaintiff is right in his position, a lien might be established against the lot on which the defendant's saw mill was erected, by making an entry of the policy in the clerk's office long after it had become *functus officio*, by the performance of every stipulation contained in it. It is said in the provision, it is true, that the lien shall continue during the policy. This does not, I think, mean during the time mentioned in the policy as the duration of the insurance, but during the existence of the policy as an operative instrument.

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My opinion is, that the judgment of the Supreme Court was erroneous, and that it ought to be reversed.

Judgment affirmed.

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An action upon an award may be brought in the Supreme Court, although the submission provides for judgment in the County Court. The right of action is not suspended until the term of the County Court succeeding the award. The defendant desiring to move that court for relief may obtain a stay of proceedings.

APPEAL from the Supreme Court. Action on an award made pursuant to a submission under seal. The award required the defendant to pay the plaintiff \$56.50 within three days after its date. By the submission the parties agreed that a judgment in the County Court of the county of Otsego might be rendered upon the award. The defence set up was that the action was brought before any term of the Otsego County Court had been held, subsequent to the making of the award, and that no judgment of that court had been obtained or sought for by the plaintiff. The judge before whom the case was tried overruled this defence, and the plaintiff had judgment, which was affirmed at a general term in the sixth district. The defendant appealed to this court. The case was submitted on printed briefs.

Elijah H. Ferry, for the appellant.

Benjamin Estes, for the respondent.

DENIO, J. It has been often held that the statute, prescribing certain forms for submission to arbitrators, and allowing the parties to agree that a judgment of a court of record, designated in the instrument of submission, should be rendered

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upon the award, was cumulative merely, not exclusive; and that an award pursuant to a submission which would have been valid at common law, but which did not conform to the statute, would support an action. (*Browning v. Wheeler*, 24 Wend., 258; *Diedrick v. Pickley*, 2 Hill, 271, and note.) Those cases accord with a general principle in the exposition of statutes which declares that it is not to be presumed that the legislature intended to make any innovation upon the common law further than the case absolutely requires. The law, it is said, presumes that the act did not intend to make any alterations other than what is specified, and besides what has been plainly pronounced; but that intention, it is to be supposed, if it existed, would have been expressed. (Dwarris on Statutes, 664.) The Supreme Court of Massachusetts appears to have taken a different view of their statute of arbitrations; for in *Deerfield v. Arms* (20 Pick., 480) it was held that an action of debt could not be sustained on an award where the submission had not been properly acknowledged before a justice of the peace as the statute required. It may be that the act of Massachusetts contained language showing that the forms prescribed were applicable to all submissions to arbitration whether a summary judgment was to be entered or not. However this may be, we are to follow the rule laid down by the courts of this State; and we think moreover that upon this question the correct principle of construction has been adopted here.

But the defendant's counsel argued that the parties having, pursuant to the statute, agreed that a summary judgment might be entered upon this submission, no other mode of enforcing the award can be resorted to. We think this position is answered by an express provision contained in the statute itself. (2 R. S., 541.) It provides that a party complaining of the award may apply to the court designated in the submission to set it aside, for certain causes which are specified; and that the application shall be made at the first term if there be time, and if there be not, that a judge may stay the proceedings by order till the following term. If the award is confirmed, the court is to render judgment upon it; and error may be brought

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upon the determination of the court whether it be in favor of or against the party claiming to enforce the award. (§§ 10-21.) Then follows section 22, which declares that nothing contained in the preceding provisions shall be construed to impair, diminish or in any way affect the power and authority of the Court of Chancery over arbitrators, awards or the parties thereto; nor to impair or affect any action upon any award, or upon any bond or other engagement to abide by an award. The intention of these provisions seems to me very plain. Either of the parties may, if they see fit, resort to the court named in the submission in a summary way, to set it aside on the one hand, or to confirm and give judgment upon it on the other. But the party complaining is not to be precluded from availing himself of the more ample powers of the Court of Chancery, if he considers it for his interest to resort to them; nor is the party in whose favor the award is made to be barred of his common law action on the award, or on the submission. If the party charged by the award elects to avail himself of the summary mode of objecting to it, and he is pursued by the other party by an action, before the term has arrived when the application can be made, he may have an order to stay the proceedings of his adversary until the succeeding term. It follows that the plaintiff in this case was not precluded from maintaining the action, nor limited to an application to enforce the award by judgment in the court designated in the submission. The judgment appealed from must be affirmed.

All the judges concurring,

Judgment affirmed.

OLCOTT v. ROBINSON.

It is sufficient notice of the sale of real estate upon execution, to post a notice as required by the statute forty-two days previous to the sale and publish a copy thereof in six successive numbers of a weekly newspaper, although the first publication may be less than six weeks prior to the sale

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APPEAL from the Supreme Court. Ejectment for the north half of Valcour Island in Lake Champlain. Upon the trial the plaintiff made title under a sale upon execution on Wednesday the 8th day of May, 1850, and the question was whether sufficient publication had been made of the sheriff's notice of the time and place of making such sale. Notice was given by the sheriff as follows: 1. By posting the same pursuant to the statute on Tuesday the 26th of March, 1850, in three public places in the town where the real estate is situated. 2. By causing a copy of such notice to be printed, in a newspaper of the county once in each week, for six weeks successively.

The newspaper was printed only on Saturday of each week; and its first publication, after the notice of sale had been given by posting, was on Saturday the 30th day of March. It was printed in the paper published on that day, and in those published on Saturday the 6th day of April, on the 13th of April, on the 20th of April, on the 27th of April, and on Saturday the 4th of May. At the time of the sale, notice was given that the notice of sale had not been advertised for six weeks previous to the sale as required by law.

The plaintiff had a verdict and judgment. On appeal this judgment was reversed at general term in the fourth district, and a new trial ordered. The plaintiff appealed to this court, stipulating that if the order appealed from should be affirmed, judgment absolute should be entered against him.

Gardner Stow, for the appellant.

Alonzo C. Paige, for the respondent.

DAVIES, J. The Revised Statutes require (2 R. S., 868, § 36) that the time and place of holding any sale of real estate pursuant to any execution, shall be publicly advertised previously for six weeks successively, as follows: 1. A written or printed notice thereof shall be fastened up in three public places in the town where such real estate shall be sold. 2. A copy of such notice shall be printed once in each week, in a news-

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paper of such county if there be one. It is conceded that the formalities required by the first subdivision of this section have been complied with, and that the time and place of the sale, so far as prescribed by it, had been advertised for six weeks successively, previous to the day of sale. The notice was fastened up on Tuesday, the 26th of March, and continued so fastened up until the day of sale, Wednesday May 8th. It was therefore, so far as the notice fastened up was concerned, publicly advertised for six weeks successively previous to the sale.

The second subdivision, it will be observed, requires a publication in the newspaper, of a copy of the notice posted up; clearly therefore implying that the posting or fastening up is to precede the publication. It is a copy of the notice fastened up, which is to be printed once in each week in a newspaper of the county for six weeks previous to the sale. There is no doubt that all the formalities of the first subdivision were strictly complied with, and the notice thus posted up was the original notice of sale. It is thus expressly declared by statute. It was put up at the right time, and continued up for the right time. No law required it to be put up sooner. A copy of the notice thus fastened up is to be printed in a newspaper for six weeks, once in each week. Can it with truth be said, that the statute requires the copy to be printed, before the original is in existence? It is a perversion of terms to say so. The original is first to be fastened up, and to be put up for the time prior to the sale required by statute, then the copy is to be printed in the newspaper. It is not correct to say that the copy of a notice, the original of which had no existence, until Tuesday, March 26th, should have been published in the newspaper of Saturday, March 23d. The copy could not be prepared for publication until the original had existence, and then it was printed in the first publication thereafter, and printed once in each week for the six weeks successively intervening between the fastening up of the original notice and the day of sale. It seems to me that this is not only a strict compliance with the spirit of the provisions of the statute, but with its letter also.

The defendant relies on the authority of an anonymous case

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(1 Wend., 90). This seems to have been submitted to the judges of the Supreme Court by a commissioner for their advice, and decided without argument. The provision of the Revised Laws, to which the case referred, was that an insolvent seeking a discharge should cause an advertisement to be published for six weeks successively, specifying the time and place for his creditors to show cause why an assignment should not be made by the insolvent, and he be discharged. It was stated to the judges of the Supreme Court in that case that it did not appear that full six weeks' notice to the creditors had been given. The affidavit of publication set forth that the advertisement or notice had been regularly published in the newspaper directed once in each week, for six weeks successively, commencing on a certain day. WOODWORTH, J., said the proof of publication was undoubtedly defective. The affidavit might literally be true and yet only thirty days' notice be given. The statute requires the advertisement or notice to the creditors to show cause to be published for six weeks successively; that is, during forty-two days. The authority of this case has been greatly impaired by the decision of the Supreme Court of the seventh district in *Sheldon v. Wright* (7 Barb., 39). In that case the provision of the statute under consideration, was that authorizing a surrogate to make an order, directing all persons interested in the estate of a deceased person to show cause, on a day to be named in such order, why so much of the real estate whereof such testator or intestate died seised, should not be sold as would be sufficient to pay his debts, and the statute further provided, that such order should immediately thereafter be published for four weeks successively, in two or more public newspapers printed in this State. (1 Rev. Laws, 450, § 23.) The order in that case was made on the 6th of September, 1826, requiring the cause to be shown before the surrogate on the 19th of October following. The order was published in the "Free Press," a newspaper printed in Auburn, Cayuga county, once in each week for four weeks successively, commencing on the 20th day of September, 1826, and in the "Cayuga Patriot," printed in the same place, once in

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each week for the same number of weeks, commencing on the 27th of September, 1826. WELLES, J., in delivering the opinion of the court, says: "I have no doubt whatever, that it is essential, in order to give the surrogate jurisdiction of the persons of the heirs, that this provision of the statute should be strictly complied with. It is the only process to bring them into court, and without it they are without their day in court. And I think that notice for the full time required by the statute is equally indispensable; that short notice would be as no notice. * * * It is claimed that the notice so far as one of the papers was concerned (the Cayuga Patriot), was not published four weeks. That the first publication, which was on the 27th day of September, was less than four weeks before the 19th day of October, when the parties were required to show cause, &c. This, as a matter of fact, will be seen upon a computation of time, to be true. But I do not understand the act to require the first of the four successive publications to be four weeks before the day of showing cause. The requirement is satisfied by four successive weekly publications before the day." And such the learned justice says has been the practical construction of the provision of the insolvent laws, requiring notice to creditors to be published in one class of cases six weeks, and in another, ten weeks. The case was brought up on an appeal to this court, and the judgment below affirmed. (1 Seld., 497.) FOOT, J., in delivering the opinion of this court, which was concurred in by five other judges, says that he has no doubt that the decision of the surrogate was correct, in respect to the time and manner of publishing the order to show cause. It was in accordance with the language of the statute, and there does not appear to be any reason for a different construction. And he refers to the decision of the Supreme Court of Massachusetts, in the case of *Bachelor v. Bachelor* (1 Mass., 255), as directly in point, and says it appears to have been better considered, and to rest on sounder reason, than the adversary opinion of our own court in an anonymous case involving the same question. (1 Wend., 90, *supra*.) If the judgment of this court had turned upon this point, in the case of *Sheldon*

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v. *Wright*, it would have been an authoritative decision of the case now under consideration. The case of *Bachelor v. Bachelor* (*supra*), would seem to be a case nearly in point. The order directed the notice to be published in a newspaper for three weeks successively. The notice was inserted in a paper published twice weekly. It was first published in the paper issued Saturday, June 30th; secondly, Saturday, July 7th, and thirdly, Wednesday, July 11th. The court held that the order had been substantially complied with. They said it was usual, however, to publish with an interval of a week, but that it was not strictly necessary—the publication has been made in three successive weeks, which is sufficient. It would seem, therefore, that the weight of authority preponderates decidedly in favor of holding that the publication of the notice in the present case was sufficient. The positions contended for by the learned counsel for the defendant in this case would lead to this result, that the posted notice should have notified the sale for May 13th, thus requiring a notice by fastening up to be a notice of forty-seven days, and the copy thereof printed in the paper on the 30th March, 6th, 13th, 20th and 27th of April, and the 4th and 11th of May, a published notice in the newspaper of forty-four days.

I do not think the statute is to be construed in a manner to lead to such results, but that its plain and literal import is to be followed. The notice is to be fastened up for six successive weeks previous to the sale, as was done in this case. A copy of the notice thus put up was to be published once a week for six successive weeks, after such notice by posting had been given. This has also been done. It follows that the judgment of the general term should be reversed, and that of the special term be affirmed.

WRIGHT, J., also delivered an opinion for affirmance, and SELDEN, CLERKE and WELLES, Js., concurred.

COMSTOCK, Ch. J. (Dissenting.) It is a condition precedent of the sheriff's power to sell lands on execution, that the sale

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"shall be publicly advertised previously for six weeks successively." This is the language of the statute (2 R. S., 378, 379, § 34), and its plain meaning is, that six whole weeks must elapse between the commencement of the advertisement and the time of sale. There is no more reason for saying that five and a half weeks than for saying that one or two weeks will answer the purpose. If we abridge the time for a single day, we may do it for as many days as we please, and the statute becomes a dead letter.

This public advertisement must be made by posting the notice of sale in the manner specified in the statute, and by causing a copy to be printed "once in each week," in a newspaper of the county in which the lands are situated. Two things, therefore, are required to make the advertisement complete, one the posting of the notice, the other, its insertion in the newspaper; and the publication in both its branches must be for six weeks previous to the sale. The "public advertisement" consists of both these things, and as that must be for six full weeks, so a shorter time will not answer for either one of these performances. There is no publication at all unless the notice is both posted and printed in a newspaper; and if we say that the time either of posting or printing may be shortened, we hold in substance that an advertisement for less than six weeks is good. This we cannot do without abrogating the statute.

It is urged, that according to this construction seven newspaper insertions will always be required before the sale. If that consequence were to follow, the opposite construction would by no means be justified. The number of insertions is not specified in the statute. The advertisement must be for six previous weeks in both the modes prescribed, and it must be in the newspaper "once in each" of those weeks. If the full period of six weeks, which must elapse between the first insertion and the sale, requires the notice to appear seven times in the paper in order to have one publication in each of the six weeks, then it must be inserted so many times. The fundamental requisition is, that the sale must be advertised for a full period of six weeks. But I think the consequence mentioned does not fol-

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low. If an advertisement is commenced on the 1st of April by posting, and inserting in a newspaper on that day, the sale can take place on the 18th of May, the intervening period being six weeks or forty-two days. Now the six weekly publications in the paper will be the 1st, 8th, 15th, 22d and 29th days of April, and the 6th of May. As the sale will take place on the 18th of May, the last publication will therefore be at the commencement of the week which immediately precedes it. This will be an undoubted compliance with the law. Another insertion on the very day of the sale cannot be necessary. The sale may lawfully take place in the morning while the newspaper may be issued in the evening. It follows that in all cases six or more insertions will be required according as the sale shall or shall not be appointed to take place precisely at the close of six weeks from the first publication.

The construction which I have indicated is the one given to similar statutes by the former and the existing Supreme Courts of this State. (1 Wend., 90; 16 Barb., 347.) We are referred, however, to the case of *Sheldon v. Wright*, in this court (1 Selden, 497), as a controlling authority the other way. But an examination of that case will show that no such point was decided. The general question involved was, whether the order of a surrogate directing the sale of an intestate's real estate was valid. One of the objections to be overcome, was the alleged insufficiency of the publication of an order to show cause against the sale. But the surrogate had expressly adjudged that the publication was sufficient, and this court simply held, so far as we can judge from the opinion given, that this decision could not be inquired into collaterally. The observations of Judge Foor, favorable to such a construction of the statute now in question as the plaintiff contends for, were followed by a disclaimer of any such ground of decision.

On the ground, therefore, that the notice of the sheriff's sale under which the plaintiff claims title, was not advertised for six weeks as the statute requires, I am of opinion that the order of the Supreme Court granting a new trial must be affirmed, and that the defendant must have final judgment

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according to the stipulation entered into on bringing the present appeal.

DENIO and BACON, Js., also dissented.

Judgment reversed and judgment for the plaintiff.

LAWRENCE, Receiver, v. NELSON *et al.*

A member of a mutual marine insurance company cannot, upon its insolvency, set off against his indebtedness for premiums due upon policies, a loss sustained by him, adjusted and payable by the company. The premiums constitute a fund which as insurer he is bound to make good for the benefit of all creditors. In his quality of assured he is bound to take a *pro rata* dividend from such fund, and can secure no preference over other creditors by reason of his being also a debtor.

APPEAL from the Superior Court of the city of New York. Action to recover the amount of six promissory notes. The trial was before a referee, who found these facts: In 1853, the General Mutual Insurance Company issued to the defendants policies upon six of their vessels. Instead of paying the premiums for insurance in cash, they gave to the company their promissory notes, payable twelve months after date. These notes amounted in the aggregate to the sum of \$2,422.50. The several policies issued by the company, for the premiums on which the notes were given, were canceled on different days, from the 2d to the 20th of January, 1854, under an agreement indorsed on them to that effect. By such agreement the amount of "return premium" on each policy was adjusted, and stipulated "to be paid ratably out of the assets of the company, when divided." These return premiums amounted in the whole to the sum of \$2,172.87. One of the policies, was on the ship Galena, on which the defendants suffered a loss, amounting to \$3,088.45, which loss was adjusted and due, and payable on the 9th January, 1854. On the 10th March, 1854,

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proceedings were voluntarily instituted to dissolve the company, and in September following, a decree was entered dissolving it, and a receiver appointed. In May, 1855, the six premium notes given to the company by the defendants having matured and being unpaid, the receiver commenced this action. The defendants claimed before the referee that the notes passed into the hands of the receiver subject to their equitable right to set off against, and to have applied to the discharge of the same, the sum of \$3,083.45, the adjusted loss due upon the ship Galena on the 9th January, 1854. On the other hand, it was claimed by the receiver that the defendants, being members of the company and corporators, were bound to pay what they owed the corporation, and would be entitled to their *pro rata* dividend of its assets, after deducting from the earned premiums, and the profits on investments of premiums, the losses and expenses incurred by the company. It was not proposed by the defendants to set off the "return premiums" and losses other than that on the Galena, but to take judgment against the plaintiff for them, to be paid *pro rata* out of the assets of the company. The referee held that the defendants were not entitled to set off the adjusted loss on the ship Galena, and ordered judgment for the full amount of the notes. The judgment was affirmed at general term, and the defendants appealed to this court. The cause was submitted on printed arguments.

A. C. Morris, for the appellant.

Alexander Hamilton, Jr., for the respondents.

WRIGHT, J. The single point in the case is, whether the defendants' loss, adjusted before proceedings were commenced to dissolve the company, can be set off against their premium notes given to the company, as a consideration for the policy on the "Galena" and other policies. If it can, it is because it is equitable and just to do so, and no rights of third persons intervene. It may be conceded, also, that the plaintiff, as receiver, stands in the same situation that the company itself

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would, had the action been prosecuted by it (being in fact insolvent) to recover the amount of the notes.

I suppose that, ordinarily, when an insolvent insurance company (no mutual relations and obligations existing among its corporators) seeks to enforce payment of a debt owing to such company for insurance premiums or otherwise, the debtor is equitably entitled to set off an adjusted loss due to him against the claim of the company. It would be inequitable to compel full payment by the debtor, and leave him to lose his debt which had accrued before the insolvency of the company. Here, however, no superior controlling equities would arise, or the rights of others intervene. It is different where the company is a mutual one, and the insured a member or corporator—an insurer as well as a party insured—and the association has no dealings in regard to insurances except with its own members. The party has entered voluntarily into engagements with others modifying, or entirely changing, as between themselves, the effect or application of the general rules of law or equity in regard to set-off. In a company of mutual insurers, each sufferer is bound to make compensation as well as to receive it. He occupies the double relation of debtor and creditor, and it would be inequitable to allow him, when the funds of the company are not adequate to pay all losses, to set off his entire demand; thereby getting more than his share of, and decreasing, a common fund to which all the creditors, *pro rata*, are entitled. Each member is interested in the premiums as well as losses of all the others, and the premium paid by each is saddled, as it were, with its proportionate share of the claims of all others. The premium, whether paid or secured to be paid, is withdrawn from his control, in contemplation of law, and placed in a common fund, not subject to his claims only, but those of all others in the company; he in turn, having a similar claim on the premiums of his associates. The members of the association virtually agree to insure each other, and provide a common fund to indemnify in case of loss. As all have contributed to this fund they have a community of interest in it; and each member having his

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proportionate share of the losses, is entitled to his proportionate share of the profits, if any are realized. It may be that one member may draw from the premiums paid by other members into the common fund, if the association be prosperous, not only the amount of his losses, but as large a proportional share of profits as those whose transactions with the company created no loss at all. In such a case, if insolvency eventually overtakes the association, it would be highly unjust to allow him to set off a loss against premiums that happened to be unpaid, and that should be placed in the common fund. Indeed when the assets of the company are inadequate to the payment of the losses of all its members, the effect of permitting a sufferer to set off his loss in full against his premium notes (which are his contribution to the means of the company) is not only to confer a benefit without making compensation, but to take from the shares of his associate sufferers in the common fund; to which fund he and they are ratably entitled. Undoubtedly, a premium paid, or agreed to be paid, by a member of a company formed on the mutual principle, must bear its proportionate share of the losses of the company, and cannot be applied exclusively to the individual debt of the party owing or paying it. So long as the company be solvent no practical injury would result from setting off a loss against the premium; as no preference would be given to one member or creditor over the others, for all would be paid in full. But if the association were insolvent, to permit the set-off to be made would be to give an unjust preference to one creditor over the others. In *Hillier v. The Alleghany Mutual Insurance Company* (8 Barr's Rep. 370), it was adjudged that the loss of a member of a mutual company cannot be set off to an action brought by the company on his premium note, when the funds of the company were not adequate to pay all losses; and that the plain and practical plan of settling the affairs of an insolvent company of mutual insurers, was to liquidate its means and responsibilities separately.

The defendants in this case became members of a mutual insurance company, by effecting insurance therein. It was one

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of that class of mutual companies, authorized to commence and transact an insurance business on the cash premiums paid by the associates. The first premiums paid were never to be withdrawn, but were pledged for losses and expenses of the company. The dealers and corporators were to pay their premiums in cash; and such premiums, and the income derived from their investment, were to constitute a fund for the payment of the losses and expenses of the company. To ascertain the profits of the company, the losses and expenses after the first year were annually to be deducted from its earnings, arising as well from premiums as from the income derived from the investment of premiums; and the balance, if any, was to be deemed the amount of net profits; and thereupon every dealer or insurer was to be credited with such a proportion of the net balance as the amount of earned premiums paid by him should bear to the whole amount of earned premiums received by the company during the year; and a certificate of profits for the amount so credited was to be issued by the company to such dealer or insurer, with a provision that the amount named therein was liable for any future loss by the company. (Laws of 1841, ch. 252; Laws of 1842, ch. 132.) The charter, in effect, directed the placing the receipts from premiums together in a common fund, and from this fund the losses, also placed in common, were to be deducted. It is obvious that each dealer became interested in all the premiums paid by other dealers, as well as in the losses sustained by the company under policies issued to other dealers. It might be that a party whose dealings with the company resulted in a large loss to it, not only would have his losses paid out of the premiums from others, but actually participate equally with them in the profits to which he had not contributed. The defendants, when they became dealers and members of the company, instead of paying the premiums in cash, as was contemplated by the charter, gave time notes for such premiums, which could only properly be received by the company in lieu of cash. Had they dealt as the charter contemplated, the question now before us could not have arisen. Now, when the company is insolvent, or unable to pay all its liabilities, instead

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of making good their contributions to the mutual fund for the payment of losses and expenses, in which each of the associates have an interest—as they have undertaken to do—and receiving their *pro rata* share of the means of the company, they seek indirectly as creditors to obtain a preference over their associate creditors. The practical effect of setting off the loss in full on the Galena, would be to exhaust the defendants' contributions to the common fund for their exclusive benefit, give them as members of the association a disproportionate share of the fund, and deprive the other members and creditors of their equal proportionate share. In short, because they have suffered their premium notes to remain unpaid, they are thereby to obtain a preference over their associates. There is no equity in this as between the associates of a company of mutual insurers.

There is no doubt that in January, 1854, when the loss on the Galena was adjusted, the company was unable to pay all its liabilities. The defendants, in fact, admitted this, by agreeing to be paid the return premium on the policy "ratably out of the assets of the company when divided." At that time, as members of the company, they contemplated a *pro rata* division of its means, and agreed to a cancellation of all the policies for which the premium notes were given (including that on the Galena), stipulating for a "return premium" on each. It is difficult, however, to perceive how the company could retain or pay back any portion of a premium never received or paid into the common fund. The agreement clearly imported that the defendants should pay their premium notes, or contributions to the common fund in full, and were to be entitled to a return of a stipulated amount of such contributions, to be paid, ratably with other creditors, on a division of the assets of the company. But be this as it may, it was an admission by the defendants that the association was at that time insolvent, and its means inadequate to discharge in full all the claims of its members and creditors. When such a state of things exists in a company of mutual insurers, whose members have each an equal interest in its means, and are each creditors as well as

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debtors, to allow one member or creditor to get more than his share of the common fund by setting off his individual claim in full, and thereby decreasing the shares of his associate creditors, would be unjust and inequitable. Yet this is the right that the defendants claim they are equitably entitled to. Having voluntarily engaged with others in a mutual enterprise, and for mutual benefit—the insurance of each other—and each dealer or corporator having an equal interest in the common fund provided as well for the payment of his losses as for a participation in the profits—they have no equitable right, in case of insolvency, to an exclusive appropriation of their premiums or contributions to the funds of the company, to the payment of the losses under the policies for which such premiums were given; but, as members, are obligated to pay such premiums into the common fund, and are only justly entitled to their *pro rata* share of it in the payment of losses. The referee therefore correctly decided that the defendants could not set off in full their loss on the “Galena,” but that they were bound to pay their premium notes, and come in, as they proposed to do in regard to their other claims, in a *pro rata* division of the assets of the company amongst all its members and creditors. What, as mutual insurers, they were ratably entitled to, could only be ascertained after all the means of the association were called in, and the demands upon it liquidated.

It is said that the cases in the books relate to mutual fire companies and have no application to marine companies. If by this is meant marine companies not formed on the mutual principle, the observation is correct. But there may be mutual companies to make marine insurance as well as against loss or damage by fire; or they may be empowered to take both species of risks. The company of which the defendants’ firm were members was of the latter description. (*White v. Haight*, 16 N. Y., 310; Laws of 1841, ch. 252.)

The judgment of the Superior Court should be affirmed.

CONSTOCK, Ch. J. The original corporators of the General Mutual Insurance Company were the persons who should pre-

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sent to the commissioners named in the charter applications for insurance to be effected, amounting to at least \$500,000. When applications should be received to that amount the company was allowed to organize by choosing trustees. All persons taking policies were to become members, as well as all persons holding certificates of losses under policies issued. The company was to have no subscribed capital. Its entire capital was to consist of premiums on insurance, and the profits arising from the investment of those premiums. The capital thus to be constituted could not be withdrawn until it reached \$500,000. All net profits over that amount were subject to division amongst those who took insurances and paid premiums thereon, and the division was to be made on *pro rata* principles; the share of each number being represented in certificates of profits. The net profits were to be arrived at annually by striking the balance between the premiums earned during the previous year and the income from investments on the one side, and the amount of losses and expenses during the same year on the other. The certificates of profit could not be redeemed until the accumulated profits of the company should amount to half a million of dollars, and then only the excess could ever be applied to that purpose. All the net earnings of the company, therefore, not exceeding that sum, formed the capital, which in case of insolvency must be applied to the payment of debts; and this capital was to be contributed by the members in the form of premiums on their policies. The charter says nothing of subscription or premium notes or of notes of any kind. It speaks of premiums only. Every person taking a policy was bound to pay the established rates of insurance. Doubtless the company might give him a credit and take his time obligations. Any insurance company can do so if not prohibited by law. But if such was the course of dealing in this company, the notes taken nevertheless represented the cash which the insured was bound to pay as the consideration of his policy, and they constituted as much a portion of the capital of the company as if the money had been paid. The notes were to be reckoned as part of the earnings in each year, because they

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represented the premiums of that year. Those who gave them were entitled to all the privileges of membership as much as those who paid a cash consideration for their insurances. (Charter, Laws of 1841, 229; amended, Laws of 1842, 138.)

The defendant, in the year 1853, took various policies or renewals of policies from this company, the premiums on which amounted to \$2,422.50. Instead of paying these premiums in cash, his notes therefor at one year were accepted by the company. According to the principles of the charter, this sum was the contribution made by him to the capital of the corporation; which in the event of insolvency all the creditors were equally entitled to. If the defendant had made this contribution in cash, it is quite clear he could not withdraw any portion to apply on the debt due from the company to him. He was a creditor in respect to the losses sustained under his policies. He was also a debtor in respect to his notes. But he held still another relation, to wit: that of a member of the company and contributor to its capital. His notes represented that contribution. He is in no better situation than other members, in consequence of having failed to pay his premiums in money. Whatever form his contributory share in making up the fund assumed, the amount was irrevocably pledged to the payment of debts until that and all like contributions from other insured parties reached the net sum of \$500,000 over all losses and expenses; and on a final division, if one should ever be made after paying all debts, the entire fund thus constituted and consolidated would be paid out upon the certificates of profits held by the members. I consider it plain, therefore, that the rules of set-off between debtor and creditor have no application to this case. The defendant is entitled as a creditor to have his losses paid if there are assets enough to pay all the debts of the corporation. But to allow him to set off his notes against those losses would be to suffer him to withdraw so much of the capital and apply it to his own peculiar benefit. This he has no better right to do than any other member has to subtract the portion which he may have contributed, whether in cash or time obligations. A creditor of a corporation who is also a

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stockholder cannot demand from the corporation the portion of the capital which he has paid in and apply it to the extinguishment of the debt. If notes are substituted for cash, in making up the capital, the result is still the same. The defendant became a stockholder, so far as such a company can be said to have stockholders, by giving his notes for the amount of his premiums. In respect to those notes he was more than a mere debtor. These obligations, accepted as his contributory share of the capital, entitled him to all the rights and privileges of membership. Like every other member of a moneyed or trading corporation he took the chances both of gain and loss. If we allow him the set-off which he demands, we virtually relieve him from the hazard of loss, because we separate from the fund and return to him all his interest in the common adventure. The result is, he must come in with other creditors in respect to the losses under his policies. He has an equal right with them to be paid out of the assets which went into the hands of the receiver, and their rights are in all respects equal to his. In the administration of those assets he will be benefited by the contributions which other members of the company made to its capital, and they should derive a like benefit from the mutual relations established by the charter. These reciprocal benefits cannot depend on the accident of notes being given for premiums instead of payment in cash, nor on the accident of the note of one dealer or member becoming due and being paid before that of another.

The result is, that the plaintiff was entitled to recover on the notes in question without set-off for losses. The judgment should therefore be affirmed.

All the judges concurring,

Judgment affirmed.

Jessup v. Hulse.

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A trust to dispose of property at such time and in such manner "as may be most conducive to the interest of the creditors" of the assignor, "and convert the same into money as soon as may be consistent with such interests," construed as not vesting in the assignee any absolute discretion, but as only superfluously stating that which the law would give him subject to the control of the courts.

Such an assignment is not within the condemnation of *Dunham v. Waterman* (17 N. Y., 9) and other cases where the trustee would derive an independent discretion by force of the deed, if valid, and not by operation of law.

APPEAL from the Supreme Court. Action to set aside a conveyance of certain real estate and to subject it to the payment of a judgment recovered by the plaintiff against the defendant Hulse. The title sought to be impeached rested upon the validity of an assignment made by Hulse to one Gott in trust for the benefit of creditors. Upon the trial the court held that the assignment was fraudulent upon its face by reason of a provision contained therein. The plaintiff had a verdict and judgment, which having been affirmed at general term in the second district the defendant appealed to this court. The cause was submitted on printed arguments.

Gott and Van Duzer, for the appellant.

E. A. Brewster, for the respondent.

SELDEN, J. The question presented by this case is, whether a general assignment for the benefit of creditors, is void upon its face, because it contains the following clause, viz.: "To sell, dispose of and convey the said real estate and personal property, at such time or times, and in such manner, as shall be most conducive to the interests of the creditors of the said party of the first part, and convert the same into money, as soon as may be consistent with the interests of said creditors."

The principles governing this class of instruments have been so clearly and definitely settled by a series of decisions, in the courts of this State, that very little is left to be determined in regard to them. Although they tend, in almost every case, to some extent, to hinder and delay particular creditors in the prosecution of their legal remedies, they are nevertheless sustained, when made by an insolvent debtor, where no unnecessary delay is produced. But it has been repeatedly held, that as creditors who have obtained judgment have both a legal and equitable right to have the property of their debtor immediately appropriated to the satisfaction of their demands, if the debtor assigns, he can authorize no delay in any form except such as is necessarily and unavoidably incident to such a trust. The assignee is a sort of substitute for the officers of the law, and must be left to act under the obligations and responsibilities which the law imposes. The assignor can neither prescribe conditions, nor invest the assignee with powers, which tend in any degree to vary or modify the duties which the law devolves upon him. Beyond investing the assignee with the legal title, and directing the order in which the proceeds shall be applied, the debtor can exercise no control whatever over the assigned property. Any clause in the assignment, therefore, which could legitimately be set up by the assignee as a justification for a course of conduct, in regard to the assigned property, in any respect different from that which the law would dictate, of necessity vitiates the assignment.

It has, however, never been held, that a provision in mere affirmation of the legal obligations of the assignee—authorizing him in terms to do precisely what the law, if the assignment was silent on the subject, would require him to do—would affect the validity of the instrument. As the agent or officer of the law, the assignee is necessarily invested with some discretionary power. He cannot sell *instanter*, but is bound to exercise reasonable care and prudence in regard to the time and circumstances of the sale. He may take time to advertise, and must therefore select the day when the sale is to take place. If no bidders should attend upon the day appointed, he would have

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power, and it would be his duty, to postpone the sale to another day. He would be obliged also, to determine whether the property should be sold in separate parcels, or all in one parcel, and to exercise, in that and other similar respects, some discretion as to the manner and circumstances of the sale. In all these arrangements, he would be bound to consult the interests of the creditors, and would have no right to defer the sale longer than these interests might be supposed imperatively to require.

Now the question in this case is, whether the clause objected to goes beyond a mere affirmation of these plain legal obligations. The law, as we have seen, would require the assignee to make such arrangements in regard to the manner of the sale as would seem best calculated to promote the interests of the creditors; and to sell the property, and convert it into money, without any unnecessary delay.

This is precisely what is required by the terms of this assignment. The assignee is virtually directed to perform his duty according to the rules and requirements of the law. If the clause in question purported in terms to invest the assignee with any discretion, as coming directly from the assignor himself, it would be fatal to the assignment; as if it had authorized the assignee to dispose of the property at such time and in such manner as *in his judgment* would be most conducive to the interests of the creditors, or as he should deem expedient and best calculated to promote their interests.

The difference between a discretion conferred by an assignor, as a power accompanying the transfer of the title, and that discretion which results *ex necessitate* from the duty which the assignee has to perform, is obvious. The assignor, being the absolute owner of the property, and in no manner obliged to assign, may annex such conditions and qualifications to the transfer as he pleases.

If he annex an improper condition, the court must pronounce the assignment itself void. It cannot hold the transfer good, and disregard the condition; because that would be to take the property from the assignor against his will. He having con-

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sented to part with his title only upon certain conditions, the transfer and the condition must stand or fall together. If, therefore, the court upholds the assignment, it must of necessity protect and enforce the terms and conditions upon which it is made. It cannot substitute its own discretion for that with which the assignor has in express terms invested the assignee. The discretion of the latter, in such a case, would be absolute and beyond the control of the court, if honestly exercised. Any bad faith on the part of the assignee would of course justify judicial interposition, but nothing short of it. The control which courts of equity have over trusts, must be exercised with due regard to the terms of the instrument by which the trust is created. Under a provision, therefore, which expressly gives to the assignor a discretion as to time, the sale of the property might be indefinitely delayed, so long as the assignee might deem it expedient to wait for better prices; and hence the effect of such a provision in subverting the assignment. On the other hand, that discretion which is unavoidably incident to the trust reposed in the assignee, is entirely subordinate to the judicial power, and any error of judgment on the part of the assignee, in its exercise, could be at once corrected by an application to the court.

All the cases involving this question which have heretofore arisen in this State have been decided in accordance with these views. An assignment authorizing the assignees to convert the property into money "within such convenient time as to them should seem meet" was held void upon its face in the case of *Woodburn v. Mosher* (9 Barb., 255). So in *Murphy v. Bell* (8 How. Pr., 468), where the assignees were directed to convert the assigned estate into money, "within such convenient time as to them shall seem meet and as shall be most conducive to the interests of all parties concerned," the assignment was in like manner condemned. Both these cases are cited with approbation by this court in the case of *Brigham v. Tillinghast* (3 Kern., 215). In *Kellogg v. Stauson* (1 Kern., 302), the authority given to the assignees was to sell and dispose of the property, upon such terms and conditions as in their judgment may

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appear best and most for the interest of the parties concerned; and this court sustained the assignment upon the ground that the phrase "terms and conditions" related exclusively to the manner of conducting the sale; but the court said, that if the discretion vested in the assignees had extended to the time of sale, it would have been fatal to the assignment. A discretion as to the time for distributing the proceeds of the assigned property has also been held to avoid the assignment. *L'Ivernois v. Leavitt* (23 Barb., 63). There the assignees were authorized to distribute the funds realized under the assignment, among the general creditors, "at such reasonable time or times as they in their discretion might think proper." In each of these cases it will be seen that the assignment contained language expressly authorizing the assignees to determine when the proper time for action had arrived. The property was to be sold, or the proceeds distributed, not at such time as the law would dictate, but when it should *in the judgment of the assignees* be expedient. The assignment in the present case contains no such language. It requires, it is true, that the interests of the creditors shall be consulted in fixing the time; but it does not say that the assignee shall be the judge of those interests. Whatever discretion is vested in the assignee here, he derives not from the terms of the assignment, but from the law; and it is this which distinguishes the present case from all those in which the assignment has been condemned. The legal effect of this assignment is in no respect different from what it would be if its language had been that the assignee should sell immediately, or at such time or times as his duty would require.

The rule on this subject is, as this court has before said, that all that an insolvent debtor who makes a voluntary assignment for the benefit of his creditors can properly do is, to authorize a sale of the property, and direct the order in which the proceeds shall be applied. In the present case the assignee has done no more than this.

The phrases objected to are wholly superfluous and without the slightest effect upon the construction of the assignment.

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The rule that "mere surplusage does not vitiate," is as applicable to such an instrument as to a judicial pleading. The judgment should I think be reversed, and there should be a new trial with costs to abide the event.

All the judges concurred; BACON, J., delivering an opinion to the same effect and upon some other points in the case which were not determined by the court.

Judgment reversed, and new trial ordered.

91	173
116	454
116	458

THE BOARD OF COMMISSIONERS OF EXCISE OF TOMPKINS
COUNTY v. TAYLOR *et al.*

Strong beer is within the meaning of the terms "strong and spirituous liquors," in the statute (ch. 628 of 1857) to suppress intemperance. It seems that any liquor is within the statute, whether fermented or distilled, of which the human stomach can contain enough to produce intoxication.

APPEAL from the Supreme Court. Submission without action, under section 372 of the Code of Procedure. The stipulation containing the facts agreed upon states that "the defendants on the 3d day of October, 1859, at their store in Ithaca, without having a license to sell any strong or spirituous liquors or wines, sold strong beer in a quantity less than five gallons, to wit: a glass of strong beer to one J. R. Smith, to be drank in their store or shop, and which was drank in their said store." The defendants claimed that they had a right to sell such glass of strong beer, without a license. The plaintiffs claimed that the defendants had no such right, and that by such sale they had forfeited the sum of fifty dollars, and were liable for such sum to the plaintiffs.

The Supreme Court, at general term in the sixth district, rendered judgment on the submission in favor of the plaintiffs for fifty dollars, with costs.

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The defendants appealed to this court. The case was submitted on printed arguments by

Ferris and Dove, for the appellants.

Dana, Beers and Howard, for the respondents.

WELLES, J. The law upon which the judgment in the court below was founded, is the 18th section of the act entitled "an act to suppress intemperance and to regulate the sale of intoxicating liquors," passed April 16th, 1857. (Laws, vol. 2, 405.) That section is in the following words: "Whoever shall sell any strong or spirituous liquors or wines, in quantities less than five gallons at a time, without having a license therefor, granted as herein provided, shall forfeit fifty dollars for each offence." The only question to be decided is, whether strong beer is embraced in the terms strong or spirituous liquors, as expressed in the section referred to.

In the case of *Nevin v. Ladue* (3 Denio, 43), it was held by the Supreme Court that ale and strong beer were included in the terms "strong or spirituous liquors" as used in the excise law of the Revised Statutes (1 R. S., 680, § 15), making it penal to sell such liquors in quantities less than five gallons without a license. The section of the Revised Statutes referred to, is identical with section 18 of the act of 1857, above recited, excepting that in the former, the penalty for such sale was \$25, and in the latter it is \$50.

The case of *Nevin v. Ladue* was afterwards taken to the Court of Errors (3 Denio, 437), where the judgment of the Supreme Court was reversed, on the ground that upon the trial before the justice, where the action was originally commenced, the judgment was rendered against Nevin on his confession that he had sold ale, or strong beer, or fermented beer, without a license. He was charged before the justice with having sold ale, strong beer or fermented beer, and he confessed the charge. The Court of Errors held that the term "fermented beer" might have well been understood by Nevin to mean some one of the

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various kinds of beer which had long been in use in this country, under the different names of spruce beer, ginger beer, molasses beer, &c., none of which could properly be termed "strong beer," or be included in the words of the statute, "strong or spirituous liquors;" and all of which had undergone, to some extent, the process of fermentation, and therefore, as the charge confessed was of selling only one of three kinds of liquor, to wit: ale, or strong beer, or fermented beer, the charge and confession might as well relate to the latter as to either of the others, and being thus in the alternative, did not prove the sale of either one in particular. The only opinion reported in the Court of Errors was by Chancellor WALWORTH, who, after an elaborate examination of the question, holds decidedly that ale and strong beer were both included in the words "strong liquors," and that both were within the prohibition of the statute. But, for the reason stated before, he was in favor of reversing the judgment. The report of the case states that Senators BARLOW, SPENCER and WRIGHT delivered written opinions for reversal on the ground that the question whether the sale of ale or strong beer was prohibited by the statute did not arise; it not being shown, as they construed the return of the justice, that the defendant had sold such liquors. But their opinions are not reported. It does not appear that any member of the court expressed any dissent from the views of the Chancellor. The case, especially as decided by the Supreme Court, is an authority directly in point in support of the judgment of the court below in the case under consideration.

In the case of *The People v. Wheelock* (8 Parker Cr. R., 9), it was held that the word "beer," in its ordinary sense, denoted a beverage which is intoxicating, and was within the meaning of the words "strong and spirituous liquors" as used in the Revised Statutes. That case was decided at a general term of the Supreme Court in the seventh district, in March, 1855. There may seem to be, at first view, a discrepancy between the case last referred to and that of *Nevin v. Ladue*, inasmuch as the latter holds that the sale of "fermented beer" is not prohibited, and in the former "beer" is held to be within the prohibition

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of the statute. But this apparent discrepancy disappears when it is borne in mind that in *Nevin v. Ladue* the expression "fermented beer" is used in addition or in contradistinction to "strong beer," showing clearly that fermented beer is there intended as something different from strong beer, or as beer which is not strong. In *The Board of Commissioners, &c., of Cayuga County, v. Freeoff* (17 How. Pr. R., 442), it was held at special term that "ale and strong beer" were included in the prohibition of the 18th section of the excise law of 1857. That case was decided in January, 1858. In the case of *The People v. Orilley* decided at a general term of the Supreme Court in the second district, in July, 1855 (20 Barb. S. C. R., 246), it was held that the sale of ale in quantities less than five gallons without a license was not prohibited by the excise law of the Revised Statutes.

The foregoing are all the reported cases decided in this State that I have met with, bearing upon the question under consideration. But I understand that in several of the districts, and particularly in the sixth, the Supreme Court have uniformly held, both at general and special terms, that the sale of ale and strong beer are within the prohibitions of both the excise law of the Revised Statutes and that of 1857; and I am not aware that the case of *The People v. Orilley, supra*, has ever been followed out of the second district.

But, independent of any adjudications of the question, it seems to me entirely apparent that the legislature had in view, both in the excise law of the Revised Statutes and in the statute of 1857 referred to, and particularly in the latter, the regulation of the sale of all and every kind of intoxicating liquors, and intended to prohibit their sale in quantities less than five gallons without the license provided for. Among the various descriptions of liquors mentioned in the statute of 1857, the sale of which it undertakes to regulate, none are specified by name, excepting wine, and that only by the general term, "wine" or "wines," without describing in any way the kind of wine. In other respects, descriptive words are employed to show the kind or character of liquors, the sale of which, with-

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out license, is denounced. First, in the title of the act: It is to suppress intemperance, and to regulate the sale of intoxicating liquors. Sections 2 and 6 use the expression "strong and spirituous liquors and wines," section 5 uses the words "strong or spirituous liquors," section 10, "any sort of strong or spirituous liquors or wines," sections 11, 20, 25 and 27, "strong or spirituous liquors or wines," sections 12, 13, 14, 15, 18 and 28, "any strong or spirituous liquors or wines," section 12, "any spirituous liquors or wines," section 15, "any strong or spirituous liquor," section 19, "intoxicating liquors," section 29, "imported or other intoxicating liquor," also, "intoxicating liquors or wines," section 31, "intoxicating drinks."

The ravages upon the physical, intellectual and spiritual condition of our race by the habitual use of intoxicating beverages, together with the labors for the last forty years of benevolent and philanthropic individuals to arrest the scourge by efforts to produce a revolution in the sentiments, practices and habits of the community in respect thereto, and the several legislative enactments with the same end in view, which have been the results of those labors and efforts, are all, as I think, matters of judicial cognizance, and are proper to be borne in mind and referred to in our examinations to ascertain the meaning and true interpretation of the statute now in force on the subject.

In view of these considerations, it is quite apparent that the great and paramount object and design of the legislature, in the present statute, was to restrain, not by absolute and indiscriminate prohibition, but by a process of regulation, the habitual and intemperate use of any intoxicating beverage. In the language of the title of the act, it was to prevent intemperance. In looking through the act, we see that this was to be accomplished principally by regulating the sale of certain liquors in small quantities, and by particular and limited prohibitions of such sales. The liquors, the traffic in which was to be thus regulated, were such as were known to be capable, when drunk, of producing, and which generally resulted in, partial or total intoxication. Speculations have from time to time been

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indulged in, founded upon the percentage of alcohol which different kinds of beverages contain, as ascertained by chemical analyses; and attempts have been made to show that the character or strength of the liquors, the sale and use of which the statute was intended to regulate and repress, is to be governed by such percentage. But it seems to me that but one safe and sensible line of distinction can be drawn between the different kinds of liquor containing alcohol, in order to determine upon which of them the statute was intended to operate; and that is, between those which are capable of causing intoxication, and those containing so small a percentage of alcohol that the human stomach cannot contain sufficient of the liquor to produce that effect; as is said to be the case with respect to spruce beer, ginger beer, lager beer and some others. It must be strong liquor; that is, strong enough with the inebriating principle or element, whether obtained by distillation or fermentation, to produce intoxication. If that be its character, the unlicensed vender at retail, or in the quantities mentioned in the 13th section, incurs the penalty of the statute.

Now that ale, strong beer, porter and most of the fermented drinks known in this country, and which are sold at public houses and groceries by the drink, can and do produce intoxication to a greater or less extent, and that such is the ordinary effect of their use as a beverage, no man of mature years, who is not strangely oblivious to surrounding and passing events, can have failed to observe. The fact is so patent that it is impossible to close our eyes against it. There is, in my opinion, one aspect in which the unrestrained sale of such liquors by the drink is far more injurious than that of distilled liquors. I allude to the temptation it presents to the reformed or reforming inebriate, who will much more readily yield to a draught of the former than of the latter, and thus fall a hopeless victim to the appetite which he had well nigh conquered.

Upon the whole, it seems to me but little short of absurd to contend that the excise law now in force should receive the construction contended for by the appellant, which would leave

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at least one-half of the evil intended to be remedied entirely untouched and unprovided against.

For the foregoing reasons I am in favor of affirming the judgment of the Supreme Court.

COMSTOCK, Ch. J., and DENIO, J., *dissented*.

Judgment affirmed.

CHOUTEAU *et al.* v. SUYDAM, Administrator.

21	179
e167	35

Whether those who have executed a written instrument are bound, it not being executed by others named as parties, depends upon the circumstances, and these may be proved by parol.

It rests upon the party who has executed and delivered the instrument to show that the delivery was intended to be in escrow.

The execution of an agreement by the assignee of an insolvent, construed under the circumstances as having been regarded as immaterial and waived by the other parties.

Where one describes himself as executor in a contract ostensibly made in behalf of the estate, and relating only to matters in which he has no personal interest, the presumption is that he intended to bind the estate, and not himself. It is not to be construed as his personal contract, because signed "A B, executor," &c., instead of "A B as executor," &c.

The act (ch. 80, of 1847) to authorize executors and administrators to compromise claims, is not restrictive of their common law power, but designed to afford them additional protection in its exercise.

APPEAL from the Superior Court of the City of New York. Action for an accounting. The trial was before a referee, by whom these facts were found: The plaintiffs are assignees of the claim of certain persons who will be designated the Ewings. On 15th May, 1852, a firm who will be styled the Suydams, who were insolvent, were indebted to the Mechanics' Bank of New York in a sum exceeding \$23,000 upon their note, which had been indorsed by Ferdinand Suydam, deceased, and on which his estate was liable. The bank held, as collateral security, four treasury warrants or certificates for annuities paya-

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ble to the Pottawatomie Indians, amounting to \$22,162.58, the title to which had been derived from the Ewings. The defendant Whitney was the general assignee of the property of the Suydams, and the defendant Charles Suydam was the sole qualified executor of Ferdinand Suydam, deceased. There was pending at this date a suit brought by the Mechanics' Bank against the Suydams and the Ewings, in which William W. Corcoran had been appointed receiver of the money due on the Pottawotamie certificates, and he had received the same and invested it in bonds of the State of Missouri of the par value of \$18,000, and bonds of the city of Nashville of the par value of \$5,000. An arrangement was made, on or about the 15th of May, 1852, by which the Ewings were to pay the sum of \$46,162.58 in full satisfaction and settlement of all claims against them of the Suydams, and the estate of Ferdinand Suydam, deceased. \$24,000 was to be paid in a draft upon the plaintiffs. On the 18th day of May, 1852, an agreement in writing was made purporting by its terms to be between the Ewings of the first part and the Charles Suydam, executor, &c., and Whitney, assignee, &c., of the second part, in which, after reciting the facts in respect to the appointment of Corcoran and his sale of the Pottawatomie certificates, it was agreed that the suit in which the receiver had been appointed should be withdrawn; that the bonds then in his hands should be sold by the Mechanics' Bank; that if they produced any excess above \$22,162.58 after paying the expenses of brokerage, &c., on sale, such excess should be paid to the Ewings, who on their part agreed that the bonds should produce the sum aforesaid or they would pay the deficit, and that such sum of \$22,162.58 "together with the interest that has accrued thereon in the hands of said receiver since the same was received by him," was to belong to the bank and to the party of the second part.

This agreement was signed by the Ewings and Charles Suydam executor of Ferdinand Suydam, but was not signed by Whitney.

Subsequent to this agreement, Whitney, who had been nominated in the will but had not qualified as executor of Ferdi-

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nand Suydam, qualified as such, and he alone defended, Charles Suydam having died. There was an excess of the proceeds, above \$22,162.58 and the interest which had been actually received by Corcoran as receiver. It appeared that certain coupons for interest upon the bonds had been detached or lost before they came into his hands. Whitney claimed to retain of the surplus enough to pay the whole amount of interest on the bonds after the time they came into the receiver's hand, but the referee allowed him only the amount actually received by Corcoran, and judgment was entered on his report accordingly; which was affirmed at general term conditionally upon the plaintiff consenting to certain modifications, reducing the amount of the judgment, which they did, and the defendant Whitney appealed to this court.

Jeremiah Larocque, for the appellant.

William Allen Butler, for the respondent.

SELDEN, J. The first question which this case presents is, whether the agreement executed on the 18th of May, 1852, by Charles Suydam, as executor of Ferdinand Suydam, deceased, of the one part, and by W. G. and G. W. Ewing of the other part, was obligatory upon the estate of Ferdinand Suydam. It is insisted by the defendant's counsel: first, that the agreement, having been executed upon one part by Charles Suydam alone, when upon its face it appears that it was also to be executed by Whitney the assignee, is incomplete, and therefore not obligatory upon any one; and secondly that, if valid as an agreement, it binds Charles Suydam personally, and not the estate of which he was executor.

It is very well settled, that where a bond, a deed, or other written instrument is executed by a portion only of those who appear in the body of the instrument as parties, the question whether those who have executed it are bound, depends upon the circumstances under which the instrument was delivered. Those circumstances are open to proof by parol, and if it

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appears, that at the time of the delivery, by any party whose signature is affixed, anything was said indicating that such party did not intend to be bound unless other parties also signed, the delivery will be considered as not absolute, but in escrow merely. The fact that the instrument was intended to be delivered in escrow, may also be inferred from the face of the instrument, or the nature of the transaction, in connection with the circumstances surrounding the parties at the time of the execution or delivery. But it rests upon the party who has signed and delivered the instrument, to establish that the delivery was intended to be in escrow.

The effect of these principles, when applied to the present case, is plain. No extrinsic evidence was offered to show that the agreement was not intended to be obligatory until signed by Whitney. We are left, therefore, upon this question, to the inference to be drawn from the transaction itself, and the circumstances attending it, so far as they appear in the case; and when it is considered that Whitney was to execute merely as the assignee of the firm of Suydam, Sage & Co., who were utterly insolvent, that inference plainly is, that the execution of the agreement by him, being considered as a matter of no moment, was voluntarily waived.

The second objection is, that the agreement was binding only upon Charles Suydam personally, and not upon the estate of Ferdinand Suydam, of which he was at that time the sole acting executor. When it is sought to charge an estate with a contract made by the executor or administrator, two questions arise, viz.: 1. Was the contract intended and understood to be made by the executor, &c., personally, or in his representative character only: and 2. If intended to bind the estate, was the contract such as could properly have that effect.

In regard to the first of these questions, I am of opinion, that where the contract itself is ostensibly made in behalf of the estate, and relates exclusively to matters in which the executor or administrator has no personal interest, if the latter, in making the contract, describes himself as executor, &c., the presumption is, that he intended to bind the estate and not him-

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self. This would be found in most cases to be in accordance with the facts, and such I think is the legal inference. In the present case, there is no pretence that Charles Suydam had any personal interest in the matter. The agreement was made exclusively in behalf of the estate which he represented, and by affixing to his signature the words "executor of F. Suydam," he indicated that it was the contract of the estate, and not his own. To say, that an agreement made in the just and proper execution of the trust reposed in an executor, if signed "A B, executor," is the party's own personal contract, while if signed "A B as executor" it would bind the estate alone, is to make a distinction which can never be generally understood, or conformed to in practice.

Upon the question whether this contract was one which the executor could properly make with due regard to the interests of the estate, there can be no doubt. By the arrangement as a whole, the estate obtained a certain indemnity against a heavy responsibility, in lieu of an uncertain and litigated claim, to the fund in the hands of the receiver. The advantages to the estate were obvious, and the executor would have been wanting in fidelity to his trust, if he had failed to enter into the arrangement.

There is, I think, no necessity for resorting to the equitable doctrine of subrogation, to sustain the plaintiff's claim. It has been held, that an action at law will lie against an executor as such, and judgment may be taken *de bonis testatoris*, for money paid at the request of the executor for the use of the estate; although it is said that such an action cannot be maintained for money had and received, because it cannot be for the benefit of an estate that the executor should receive money to the use of other persons. The excess in this case over and above the stipulated amount belonged to the Ewings. So far, therefore, as such excess was applied to the satisfaction of the debt due to the bank, it was strictly money paid for the use of the estate, and where the law would imply a promise, it will certainly sustain one which is express. The objection, therefore, could only apply at most to the small balance of \$292.32, paid

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over by the bank to the executor, and connected as that is, with the other portions of the arrangement, considering the unequivocal benefits accruing to the estate from the transaction as a whole, the objection should, I think, be regarded as without force even as to that.

It was further objected upon the argument that the executor in this case did not obtain the authority of the surrogate to compromise the claim of the estate, to the proceeds of the Pottawotamie certificates, pursuant to the act of 1847. (Laws of 1847, 88.) The object of that statute was, not to confer upon executors and administrators powers which otherwise they would not possess, but to afford them additional protection, when acting in good faith in the exercise of their common law powers. Although they could compromise a claim, or compound a debt, without the aid of the statute, still they might perhaps be held responsible for any serious error in judgment, in so doing. The act in question enables them to obtain the sanction of the judgment of the surrogate in addition to their own, and this affords them additional protection, if their conduct is fair and honest. The compromise in this case is obviously one which does not need the protection of the statute. It follows from these views, that the judgment of the Superior Court was right, unless some error was committed in adjusting the amount.

A point is made upon the construction of the agreement. The sum received by Corcoran, the receiver, from the treasury, was \$22,162.58, and by the terms of the agreement, the Mechanics' Bank was to be entitled to retain this sum out of the proceeds of the bonds, together with the "interest which had accrued thereon, in the hands of the receiver," the excess being to be paid to the Ewings. The appellant claims that this entitled the defendants to interest upon the whole fund in the hands of the receiver, from the time it was received by him, until it was paid over to the bank. The referee held that it gave them only the interest actually realized upon the fund.

There is no doubt, I think, that the construction adopted by the referee was right. There would have been no necessity for

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the use of the term "accrued" if it was intended to allow interest upon the whole sum for the whole time. The words "with interest thereon while in the hands of the receiver," would have better expressed such an intent.

The referee undoubtedly erred in carrying out his construction, by not allowing the \$411 of interest which had, I think, in the sense of the contract, accrued upon the Missouri state bonds, between the 1st of January and the 18th of May, 1852, although not payable until the 1st of July. This error, however, was corrected by the court below at general term. He also erred in charging the defendants with the five missing coupons, which had been detached from the Nashville city bonds, but that has also been corrected.

The only other error, in stating the account, insisted upon on the part of the appellant is, that he has not been allowed the sum of \$554.06 charged by the Mechanics' Bank, in its account with Suydam, Sage & Co., as the commissions of the receiver. I can see no ground upon which this sum could have been properly allowed to the defendants. No such item was provided for in the contract between the parties.

It appears that that sum was retained by the bank in its settlement with the assignee of Suydam, Sage & Co., but the evidence does not show that it was ever paid over to the receiver. If, however that fact appeared, still the item could not be allowed, for the reason that the Ewings have never agreed to any such deduction. The Superior Court at general term, in correcting the errors which they found in the statement of the account by the referee, acted in strict accordance with the uniform practice in such cases. It is well settled, that when the only error in a judgment is an excess in amount, and such excess consists of a distinct item, or can be definitely ascertained by mere computation, the appellate court may make the reversal of the judgment depend upon the election of the party to relinquish the ascertained excess, and in case of his so electing may affirm the judgment.

The changes which have occurred from time to time in the persons representing the estate of Ferdinand Suydam, do not

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affect the case. The contract of Charles Suydam bound the estate; and this obligation continues, whoever may succeed to the duties of the trust.

The judgment should be affirmed, with costs of the appeal to this court.

All the judges concurring,

Judgment affirmed.

JUDD v. O'BRIEN & WADDLE.

The notice of foreclosure of a mortgage by advertisement sufficiently specifies the place where the mortgage is recorded, by stating the clerk's office and the date of record, though the number of the book in which it is recorded is erroneously stated.

It is essential that the notice should declare that the *mortgage will be foreclosed* by sale. A mere notice of the sale of the mortgaged premises, without declaring it to be for the purpose of foreclosure, or in execution of the power of sale contained in the mortgage, is it seems insufficient.

APPEAL from the Supreme Court. The action was a judgment creditor's suit, in which the plaintiff sought to obtain satisfaction of the amount of two judgments which had been recovered against A. V. Masten, and which he alleged were liens upon a lot of ground in the village of Penn Yan. The complaint admitted that Masten had mortgaged the lot before the lien of the plaintiff's judgments attached, but it averred that the mortgage had been paid by the perception of the rents and profits realized by the defendants, who had gone into possession under the mortgagee.

The defendants set up a foreclosure of the mortgage by the defendant O'Brien, as assignee, by advertisement; that he became the purchaser, and subsequently conveyed to the defendant Waddle. The case turned wholly upon the regularity of the alleged foreclosure. The notice of sale, which was printed

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and posted up according to the statute, was in the following words :

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" Abraham V. Masten on the 24th of July, 1845, made and executed a mortgage to William H. Sackett of New York city, to secure \$400 payable in four equal annual payments from the 2d day of June, 1845, with annual interest; which mortgage was recorded in the office of the clerk of Yates county, on the 24th July, 1845, at 3 o'clock, P. M., in liber 21 of mortgages, on page 549; and on said mortgage is this day due \$107.50, said mortgage is duly assigned to John O'Brien. The mortgaged premises are described in said mortgage as follows :

" 'All that certain piece or parcel of land, situate, lying and being in the village of Penn Yan, in the county of Yates, known and designated as canal lot number seventeen, being the same premises conveyed by Joseph Jones, Morris F. Sheppard and Ebenezer B. Jones to Horace B. Miller; and by the said Horace B. Miller conveyed to John L. Stoakes by deed, bearing date the thirteenth day of May, one thousand eight hundred and thirty nine, and recorded in the office of the clerk of Yates county on the third day of September, 1839, being the same premises conveyed by Henry Masten, master in Chancery, to Alvin Winants, May 14, 1845. Default having been made in the payment secured by said mortgage, and no suit or proceeding having been instituted at law to recover the debt now claimed to be due upon said mortgage or any part thereof, the same will be sold at public auction, at the American Hotel, in Penn Yan, on the 17th day of October next, at 10 o'clock, A. M.'

" Dated *Penn Yan*, July 16, 1849.

" E. VAN BUREN, *Attorney*.

" JOHN O'BRIEN, *Assignee*."

The defendants' counsel objected that the notice misdescribed the book in which the mortgage was recorded; and it was admitted that the record was in book number eleven instead

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of number twenty-one. In fact there were then but fourteen books in which mortgages were recorded in the Yates county clerk's office; but the *time* of recording was correctly stated in the notice. He also objected that the notice did not state the amount claimed to be due on the day of its first publication; and finally, that the notice was not of a sale or the mortgaged premises, but of the mortgage itself of the mortgage debt; the words in the notice, "the same will be sold," referring, as he insisted, to the mortgage or the mortgage debt, and not to the mortgaged premises.

The referee, before whom the case was tried, overruled these objections, and made his report in favor of the defendants. The judgment entered thereon was affirmed at general term in the seventh district, and the plaintiff appealed to this court.

Francis Kernan, for the appellant.

David B. Prosser, for the respondents.

DENIO, J. The statute requires the notice in the case of a foreclosure by advertisement to state the date of the mortgage and where recorded. (2 R. S., 546, § 4.) This notice gives the clerk's office and the date of recording correctly, but there is an error in the number of the book. If there had been no reference to the number and page of the book, but only a statement of the time of recording in the proper clerk's office, I think there would have been a substantial compliance with the requirement of the statute. Conveyances are required to be recorded in the order of the time of delivery to the clerk for record. (1 R. S., 760, § 24.) A person being thus informed of the place in the series of recorded mortgages, where the one of which he is in quest might be found, would never be at a loss in laying his hand on it. This would not be, a sufficient answer if the act had required the volume and page to be stated; but it is not so precise in its requirements. The place where recorded would be sufficiently indicated by naming the office and the date of the record, and possibly by the mention of the

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office alone. But here is a positive error; and the question is whether it is one calculated to mislead; or rather whether the notice, considering the error which entered into it, fails to accomplish the object intended by the statute. We think it does not. There being no book in the office of as high a number as the one mentioned, an inquirer would immediately recur to the other test of locality, the date, and could not fail immediately to find the record. The case is within the maxim "*falsa demonstratio non nocet*."

It is also required that the notice should state the amount of the mortgage debt at the time of its first publication. The notice is dated the day before the day of publication in the newspaper, and the sum is stated to be the amount due on that day. Hence there is a failure literally to comply with the statutory direction. But we think the error is of too trifling a character to entail upon the whole proceeding a judgment of nullity. The interest for another day would be less than two cents. So far as the effect of a tender is concerned, there is no doubt but that the offer of the sum mentioned would have been sufficient as against the holder of the mortgage. The interest for the additional day might be easily ascertained by one desirous of knowing the precise amount at the day of publication. The statute does not say that the amount shall be set down in dollars and cents, though that is doubtless the readiest manner of complying with its direction; but I am not convinced that a statement that a particular amount was claimed to be due at a certain prior day, and that the mortgagee claimed that sum with interest from that time, would not be sufficient. On the whole, we think the objection was properly disposed of by the referee.

The objection which assumes that according to the notice, it was the mortgage or mortgage debt and not the mortgaged premises which were advertised to be sold appears to be hypercritical. We are to read this paper in the sense which the parties interested, and the public who were invited to purchase, would have placed upon it. It is parcel of the law of the State that mortgages, in the form in use in this country, may be fore-

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closed by advertising, where there has been a default in the payment of the mortgage debt, if no suit or proceeding at law has been prosecuted to recover it. When this notice recited these circumstances immediately after a description of the mortgaged premises, and proceeded to state that the same would be sold at public auction, no one we think could be so perverse as to understand that it was anything else than the land mortgaged which was to be so disposed of. A slight change in the punctuation, by changing the period into a comma before the word "default," and the insertion of a copulative conjunction at that place, all of which we think may be fairly understood, would make the sense perfectly plain. The defendants' criticism is based upon the grammatical principle that words of reference relate to the last antecedent; but this, though a general rule, is not a universal one. Where the sense of the writer shows that a subject placed earlier in the sentence is the one intended to be referred to, that construction will be adopted.

Although we do not find the notice liable to the exceptions which were taken against it on the trial, we would not advise its adoption as a precedent to be used in mortgage foreclosures. There was a point taken on the argument which had it been mentioned on the trial would have raised a question of more gravity than those we have been considering. The statute says that "notice that such mortgage will be foreclosed by a sale of the mortgaged premises or some part thereof shall be given," &c. This notice does not intimate in any way that the sale which is spoken of is for the purpose of foreclosure, nor (what would be equivalent) that the sale is to be by virtue of a power of sale contained in the mortgage. We suppose that most persons would readily enough conjecture the purpose of the notice adopted in this case; but titles to land ought not to be left to depend upon vague inferences. We have noticed this feature in this case lest it might hereafter be supposed that this form of notice had been approved of by the court. We place the judgment of affirmance on the ground that none of the objections taken upon the trial were tenable, and that we

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are only to pass upon the points there plainly raised. The judgment must be affirmed.

All the judges concurring,

Judgment affirmed.

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In an action for the foreclosure of a mortgage to secure the purchase money of the premises, one of the defendants, against whom no personal claim was made, set up by way of answer that he had purchased the premises of the plaintiff's grantee (who was also a party defendant, and against whom a judgment for the mortgage debt was asked): and had become the assignee of the plaintiff's covenants against incumbrances and of warranty: and had been evicted by paramount title under certain taxes, which were incumbrances at the time of the plaintiff's grant: *Held*, that these facts did not present anything which he could interpose, either by way of defence or counterclaim, to a foreclosure of the mortgage.

APPEAL from the Supreme Court. Action to foreclose a mortgage, made by Joseph W. Savage to the plaintiff. The defendant McKay by his answer set up this state of facts: In June, 1847, the plaintiff, in consideration of \$10,000, conveyed the premises in question to one Savage, by deed with covenants of seizin, quiet possession, against incumbrances, and for further assurance, and with a covenant of general warranty. Savage paid \$2,000, part of the purchase money, and executed a bond and the mortgage in question to secure the balance. McKay was jointly interested with Savage in the purchase and in the covenants, and the deed was made to Savage for the joint benefit of Savage and McKay, as was known to the plaintiff. A few days after the conveyance by the plaintiff, Savage, in consideration of \$5,000, conveyed to McKay the undivided half of the premises, with covenants of seizin, quiet possession, and warranty, and McKay assumed to

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pay one-half of the mortgage to the plaintiff. In 1849, Savage, in consideration of \$2,350, conveyed to McKay the other undivided half with like covenants; at the same time Savage executed to McKay an assignment of the covenants of the plaintiff on the ground that they were personal covenants, and did not run with the land; and McKay agreed to discharge Savage from all liability in regard to the title. By virtue of these conveyances McKay went into possession and paid \$3,000 of the remainder of the purchase money, leaving \$5,000 unpaid. The defendant further set up, that the premises were not free and unincumbered of charges, taxes, &c., at the time of the conveyance, but were incumbered by certain taxes lawfully assessed by and for Erie county, which were a lien and incumbrance on the premises. They were sold by the Comptroller according to law for the taxes, and conveyed to Roswell Steele, the purchaser. James Bennett, McKay's tenant, was evicted by due legal proceedings founded on the title thus acquired by Steele, of which the plaintiff had notice. The same facts are set up by way of further answer; a breach of the covenant of warranty is formally alleged, and damages averred, viz.: loss of premises, purchase money and costs of ejectment suit, and the answer concludes with a prayer that the defendant McKay recover damages of the plaintiff. In the complaint judgment was claimed only against Savage for any deficiency that might remain unpaid after the sale; and the defendant McKay was notified in writing at the time of the service on him of the summons, that the plaintiff made no personal claim against any of the defendants except Savage.

The defendant Steele answered, setting up his title to part of the premises mortgaged. It appeared by a comparison of the descriptions that a portion of the premises was not affected by the tax sale. The other defendants made default. On the trial before a referee, McKay offered to prove the facts set up in his answer. The evidence was rejected, on the ground that he could not avail himself of such facts either as a defence or by way of counterclaim. The referee ordered judgment for foreclosure and sale, and against Savage personally for the

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deficiency if any, and against McKay for the costs occasioned by his answer.

Upon McKay's appeal the judgment was modified at general term, by providing that it should not be a bar to any action to be brought by McKay on the covenants in the plaintiff's deed; that the complaint be dismissed as to Steele with costs, and the judgment affirmed in all other things. McKay appealed to this court.

John T. Talcott, for the appellant.

Sherman S. Rogers, for the respondent.

COMSTOCK, Ch. J. The situation of the several defendants and their relations to the controversy are as follows: Savage was the mortgagor and was personally bound for the payment of the debt. McKay was the purchaser of the premises subject to the mortgage, but in his answer he insisted that all his right and title had passed to the defendant Steele under the tax sale. Steele was the purchaser at the tax sale, and in his answer he claims to have acquired by that purchase a title to a portion of the premises which overreached the mortgage. Savage, the mortgagor, did not answer the complaint.

Upon this state of facts alone, and laying out of view the question of counterclaim on the plaintiffs' covenants of warranty, the plaintiffs were entitled to the usual decree of foreclosure and sale in respect to so much of the premises as Steele did not claim, and for the deficiency against Savage. None of the defendants could resist or complain of such a decree. Savage could not, because he made no defence. McKay could not, because in effect he disclaimed all interest in the land. Steele could not, because he only claimed the part which would not be affected by such a decree. Such is in fact the decree actually pronounced, and so far there is plainly no ground for the present appeal of McKay.

But the decree directs the sale of the whole premises, as well the part claimed as that not claimed by Steele in hostility to the mortgage, while at the same time it dismisses the

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complaint as to him with costs, leaving the question of title, however, open between him and the person who should purchase at the sale. The reasons are not apparent for such a disposition of the case. The referee found the facts to be true which Steele averred in his answer relating to the tax sale and his own title under it. If, then, Steele thus acquired a paramount title, he had a right to claim an unqualified decision in his favor. If otherwise, then the plaintiffs were entitled to an unqualified foreclosure and sale. There is, however, nothing in this disposition of the controversy between the plaintiffs and Steele of which McKay can complain. He shows no interest in himself which is at all affected, and so far therefore there is no ground for his appeal. This becomes still plainer when we consider that notwithstanding the tax sale by which he claims to have been divested of his title, the mortgage may nevertheless remain a valid lien on the whole premises, and the plaintiffs may have a right as against the purchaser at that sale to foreclose and sell the whole. (1 R. S., 937, §§ 112 to 119, 5th ed.) McKay fails to aver in his answer that the notice was given which the statute prescribes in order to cut off the mortgage. If, therefore, a judgment might have been pronounced, as is plainly the case upon his answer, for an absolute sale of the premises which would foreclose the rights of Steele, he surely cannot complain of one which directed the sale without foreclosing those rights. The plaintiffs and Steele might each have a regular appeal because their rights were not more fully adjudicated, but McKay has no interest in that question.

It is said that McKay, on purchasing the premises from Savage, assumed and agreed to pay the plaintiffs' mortgage, and that he ought to be relieved from that liability in consequence of the eviction under the tax title of Steele. But there is nothing in the decree which can affect his rights in this respect. Upon his own showing he stands in the relation of indemnitor to Savage, so that if the liability of Savage upon his bond shall be enforced, a cause of suit will arise against himself. The neglect of Savage to answer and the judgment against him by reason of that default, do not affect the question. McKay

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cannot be prejudiced by that judgment. His own answer may perhaps exhibit facts which ought to exonerate Savage from any further liability for the purchase money of the premises. But if Savage did not for himself choose to interpose that defence, he must take the consequences and he alone. He cannot resort to McKay without proving the liability. His own default, and the judgment thereon against him, will not establish it against another party.

The appellant's answer, the truth of which he offered to prove, shows that he is the assignee of all the covenants contained in the conveyance of the plaintiff to Savage, among which are the covenants against incumbrances and for quiet enjoyment. These were broken, he insists, by the eviction at the suit of Steele under the tax title, and he claims that the facts constitute a counterclaim which should have been tried and determined in his favor. But I think this point is not well taken. A counterclaim must be one "existing in favor of a defendant, and against a plaintiff between whom a several judgment might be had in the action." Upon McKay's own statement which he offered to verify, I do not see that anything was in litigation between him and the plaintiffs, or that any judgment could be rendered against him except one for costs for interposing a groundless defence to the suit. According to the answer no cause of action existed against him. The complaint claimed nothing against him personally, and stated no facts as the foundation of such a decree. The answer showed that he had no title or interest in the mortgaged premises to be affected by the decree. His defence, therefore, must be deemed to have been put in for the mere purpose of establishing a legal cause for an independent suit on the plaintiffs' covenants, without any demand against himself being at all involved in the controversy. Without undertaking at this time to expound the provisions of the Code which relate to counterclaim, I am satisfied they do not apply to such a case as this. Of course the claim could only be enforced in this case by a judgment in the appellant's favor for the damages sustained in consequence of the eviction. But the plaintiffs might, notwithstanding such a

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judgment, be entitled to the decree for foreclosure and sale which they have obtained. The alleged counterclaim does not impair or affect the right to that relief. I apprehend that a counterclaim, when established, must in some way qualify or must defeat the judgment to which a plaintiff is otherwise entitled. In a foreclosure suit a defendant who is personally liable for the debt, or whose land is bound by the lien, may probably introduce an off-set to reduce or extinguish the claim. But where his personal liability is not in question, and where he disclaims all interest in the mortgaged premises, I do not see how he can demand a judgment against the plaintiff on a note, a bond, or a covenant. Such is virtually this case. The appellant has, as he insists, a cause of action against the plaintiffs upon a broken covenant, but that cause of action, if it exists, does not enable him to resist or modify the relief to which the plaintiffs are entitled. I think the judgment should be affirmed.

CLERKE, J., also delivered an opinion in favor of affirmance, and all the judges concurred.

Judgment affirmed.

MESSINGER v. THE CITY OF BUFFALO.

The city of Buffalo employed the plaintiff to pave a street and to furnish sand for that purpose under a contract by which it was to grade the street, and the work of paving, &c., was to be performed under the direction of its street commissioner. The city so excavated the street as that a quantity of sand beyond that specified in the contract was necessary to bring up the paving to the grade established, and the plaintiff, by direction of the street commissioner, furnished the excess required: *Held*, that he was entitled to compensation therefor by the city.

The authority of the corporation is to be implied from its having, by its own act, rendered the extra material necessary to conform the work to the conditions of the contract.

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APPEAL from the Supreme Court. Action for extra materials furnished by the plaintiff in paving a street under a contract with the defendant. The trial was before a referee, who found these facts:

The city contracted with the plaintiff to sand and pave Clinton street. The grading of the street was to be done by the city. The contract provided that the street should be graded to a sufficient depth to receive eighteen inches of lake sand next to and underneath the paving stone; which sand was to be furnished by the plaintiff, and to be of a uniform depth of eighteen inches under all the stone in the street. The work was to be done under the direction of the street commissioner and the committee on streets, or of such other person as they might appoint to superintend it. The plaintiff proceeded to execute his contract, and the work of grading and forming the street, by the city, went on simultaneously. It excavated to such a depth that eighteen inches of sand under the stones would not bring the street up to the grade established, but it required an average depth of twenty-two inches. The effect, therefore, of complying strictly with that part of the contract in relation to the depth of the sand underneath the pavement, was to drop the street below the grade fixed by the defendant; and this the plaintiff informed the street commissioner, the chairman of the street committee of the common council, and the city surveyor, that he must do. They all directed him not to drop the street, but to furnish the extra sand to bring it up to the established grade. He furnished and deposited in the street 616 extra yards of lake sand to bring the same up to the grade, at a cost of \$462. It did not appear that the common council had knowledge that the plaintiff was furnishing the extra sand while the work under the contract was progressing, unless it might be inferred from the fact that the chairman of the street committee knew of and directed it. The city paid for the work at the price named in the contract, but refused to pay for the extra sand furnished, and this action was brought. The referee decided that the city was not liable. The judgment entered for the defendant on his report was affirmed at

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general term in the eighth district, and the plaintiff appealed to this court.

John L. Talcott, for the appellant.

George Wadsworth, for the respondent.

WRIGHT, J. The defendant is not liable if it did not, as a municipal corporation, contract with or authorize in any way the plaintiff to furnish the additional sand required to bring up the street to the grade which it had itself established. Undoubtedly, though a municipal corporation be charged with the duty of regulating and repairing the streets, no action will lie against such corporation for repairs put upon them without its assent or authority. It may be doubted, however, whether, in all cases, to make the city of Buffalo liable for work done in improving its streets, its common council must necessarily contract for the doing of such work, and that none other of its agents or officers have any authority in the premises. But assuming that the authority is only with the common council, the same power that contracts may assent to vary or modify the contract. That I think was in effect done in this case. It does not seem to be a case where a contractor, not content with his contract, colludes with the subordinate officers of the corporation to obtain more than the price for which he has agreed to do the work, in the way of extra compensation. It is rather one where extra labor was required to be performed by the contractor in the fulfillment of his contract, because of an act of the corporation itself, and which the contractor could not control.

The contract of the plaintiff was to pave the street, and put underneath the pavement eight inches of lake sand, for which he was to receive a stipulated compensation. He had nothing to do with forming or grading the street, but that was the business of the city. The city did form and grade it in such a way as that it was impossible for the plaintiff to comply with the contract in regard to paving according to the established grade,

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and also in regard to the quantity of sand. The city had contracted for eighteen inches of sand under the pavement; but subsequently excavated and graded the street in such a way as to require twenty-two inches. That the pavement should be brought up to the established grade was the important point, and for the interest of the defendant, as the paving would otherwise have been useless. I think, therefore, that the city, in effect, consented to vary the contract in regard to the quantity of sand to be furnished. It was not necessary that such assent should be expressed by a formal resolution of the common council, but it may be implied from its acts relating to the particular work subsequent to entering into contract with the plaintiff.

It is urged that when the plaintiff found that he could not fulfill his contract in all its particulars, he should have obtained the action of the common council before commencing or continuing the work. This could not have been absolutely required to enable him to recover. The corporation had authorized the street commissioner to make the contract, and the contract made provided that the work should be done under the direction of such commissioner. This plainly intended that the street commissioner might direct in regard to variations rendered necessary by the action of the city authorities. Had the plaintiff insisted on doing the work in precise accordance with his contract, the street commissioner could have prevented it, or at least it would have been his duty to present the matter to the common council. Instead of doing this, however, he directed that the street should not be dropped below, but that extra sand must be furnished by the plaintiff to keep it at the grade.

Under the facts found, I am of the opinion that the plaintiff should have recovered. The city must be deemed to have impliedly assented to the alteration of the contract in respect to the quantity of sand to be furnished.

The judgment of the Supreme Court should be reversed, and a new trial ordered, with costs to abide the event.

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COMSTOCK, Ch. J., SELDEN, DENIO, BACON and WELLES, Js., concurred; DAVIES and CLERKE, Js., dissented, and were for affirming the judgment.

Judgment reversed.

BARTLETT v. JUDD.

In ejectment for land claimed to be conveyed by a sheriff's deed upon sale under execution, parol evidence is admissible, that the sheriff at the sale expressly excepted the land out of a larger tract offered by him for sale. The exception in the sheriff's deed of land "conveyed by A B" to the defendant, construed as covering land conveyed to the latter, through mesne conveyances, by A B's grantees.

The sheriff's deed re-formed in accordance with the facts, and the demand of the defendant in his answer.

The statute of limitations, if ever a bar to such relief upon the application of a defendant, does not commence running until he is charged with knowledge of the plaintiff's assertion of a claim, under the deed, inconsistent with the actual exception made at the sale.

APPEAL from the Supreme Court. Ejectment to recover two and a half acres of land in possession of the defendant, who claimed to hold them as purchaser by contract from Martin Grover, who derived title through several mesne conveyances from Daniel Tuttle, the common source of title. In January, 1835, the plaintiff recovered a judgment against Tuttle for some \$147. In 1836, Tuttle became the owner, by purchase, of lot No. 4 in Scio, Allegany county, containing about one hundred and forty-one acres of land, portions of which he subsequently sold and conveyed to Sheldon Brewster, Norman Perry, John B. Church and John Moore. Moore's deed covered about sixty-three acres, and the premises in question in this suit are included in that conveyance. In August, 1837, Moore sold and conveyed his sixty-three acres to William Smith, who by his agent was in possession of this land in August, 1839. Upon an execution issued on the plaintiff's judgment, the sheriff advertised the real estate of Tuttle, and on the 18th of August,

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1839, he offered for sale the interest of Tuttle in lot No. 4, with certain reservations, which in the certificate are described as follows: "Excepting and reserving therefrom the lands conveyed by Daniel Tuttle to Sheldon Brewster, Norman Perry, John B. Church and William Smith." The plaintiff became the purchaser at the sale, and in November, 1840, obtained the deed of the sheriff for the premises, in which the lands are described, and the reservations are expressed, precisely in the same words used in the certificate.

Upon the trial before the referee it was proved, under the objection of the plaintiff that the testimony was incompetent, that at the sale the sheriff did not offer the sixty-three acres held by Smith for sale, but publicly declared that the same were not embraced in the lands sold. The exception in the certificate was intended to exclude them. The referee found all these facts, and as a conclusion of law held that the plaintiff acquired no title to the premises in question by reason of the same having been excepted from the lands conveyed, and that the exception in the certificate and deed should be read as if the words "by Daniel Tuttle" were left out. He did not expressly find that the deed should be reformed, as the defendant in his answer had demanded by way of affirmative relief, but on appeal by the plaintiff the court at general term gave the defendant leave so to modify the judgment as to direct the re-formation, and it was accordingly done. The plaintiff appealed to this court.

Albert P. Lanning, for the appellant.

E. Peshine Smith, for the respondent.

BACON, J. I am by no means clear that as the deed stands, and without any change in its terms, the sixty-three acres within the boundaries of which the parcel now in question is contained, is not excepted. There was no doubt that the land conveyed to Smith, and then actually held by him, was intended to be excepted. The only obscurity, if any there is,

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arises from the recital that it was conveyed to him by Tuttle, whereas in point of fact it was conveyed by Tuttle to Moore, and from him to Smith. Moore was simply the conduit through which it passed, an intermediate link in the chain which connected the two by only a single remove. In a legal, if not perhaps in a strictly popular sense, it may be said the premises are conveyed by Tuttle to Smith through Moore. The deed by Tuttle to Moore was to him, his heirs and assigns. The covenants of the grantor would enure to the benefit of, and include Smith, the subsequent grantee of Moore. There is both privity of estate and of contract between Tuttle and Smith, the covenants running with and being attached to the land. It is said that "where a party covenants in a deed for himself, his executors and assigns, the word assigns embraces any person to whom the property or interest described in the deed may happen at any future time to be assigned, either by deed or by operation of law." It seems to me, therefore, that it is putting no violence on the language of this deed, to construe it as embracing the land conveyed in effect by Tuttle to Smith, although in point of fact, in its transmission, it happened to pass through another's hands.

II. The case made by the defendant was one manifestly calling for the reformation of the deed, if there is no valid legal objection to the reception of the evidence by which it was established. Although cases may be found in which such evidence has been held inadmissible where the question was one strictly of legal cognizance, yet the doctrine that a deed, contract or other instrument may in equity be reformed has been too long established to require authority to be cited to sustain it. In some of the cases where, in an action of ejectment, proof of this character was rejected, it was nevertheless intimated that a remedy existed for the party by resort to equity. Thus in *Jackson v. Roberts* (7 Wend., 83), where the sheriff's deed recited a sale under four executions, and the defendant offered to show by parol that in fact the sale was only made under one, the evidence was rejected. The court affirmed the ruling, saying that it was not admissible as a

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defence in that action; but, they add, such exclusion will not work a mischief to the party suffering thereby, since he can have relief by a summary application to the court under whose authority the officer acts, or through the medium of a court of equity. To the same effect is *Swick v. Sears* (1 Hill, 17). Under our former system it will hardly be questioned that on a bill filed by the present defendant, setting forth and establishing the facts found in this case, he would be entitled to have the deed corrected, and to be quieted in his title to the land. But this resort is no longer necessary since, by our present system, an equitable defence may be interposed as well in an action of ejectment as in any other form of proceeding, and the defendant may also claim in the same action any affirmative relief to which he shows himself to be entitled.

I should hardly be willing to concede that by the legitimate application of any rule of evidence, or within any clearly adjudged case, the evidence given before the referee was objectionable. The question is not as to what was the intention of the parties officiating at the sale, nor is it sought, strictly, to contradict the deed, and make it speak a language utterly at variance with its purport and meaning. But the point of inquiry is, what as a matter of fact was done by the sheriff at the sale. As to this there is no contradictory evidence, but it is past all doubt or dispute that he did not sell the sixty-three acres, but expressly excepted them from the sale. Beyond all question he so intended to express himself in the certificate, and when he recited that the lands conveyed by Tuttle to Brewster, Perry, Church and Smith, were excepted and reserved, he spoke of Tuttle as the grantor and assumed the others to be his immediate grantees, as all were but Smith. The statute only makes the certificate presumptive evidence of the facts stated in it, and it clearly appears that the certificate recites a fact either falsely or mistakenly; and it is immaterial which. The presumption is thus overcome by evidence that it is wrong, and it should be corrected. The plaintiff in this case stands in no better position than if this were a deed *inter partes*, in which case no authority denies that the deed can be

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reformed. He was the purchaser at the sale. He stood by and heard the proclamation of the sheriff, that the sixty-three acres were excepted from the sale, and he purchased knowing that he was not bidding upon this land, and that he was to have no title to it. Being chargeable with notice before he received his deed, it is both dishonest and inequitable for him to lay by for fourteen years after he has received his deed, during all which time the property has been constantly occupied by others under a title which no one pretended to question, and then seek to recover land to which of right he has not the shadow of a claim.

The case of *Mason v. White* (11 Barb., 173), which is much relied on by the counsel for the plaintiff, decides nothing adverse to these views; or if it does, it cannot be followed as an authority in this court. There the deed was given, not to the purchaser at the sheriff's sale, but to the assignee of the certificate, a third party who did not appear to have been present at the sale, and was chargeable with no notice of what there took place. The question also was entirely different. The description of the land in the certificate and deed was so vague and uncertain that it was doubtful which of two pieces, either of which might be made to answer the description, was really intended to be sold; and the point of the inquiry was to ascertain what was the intention of the sheriff. The whole evidence was of the most vague and undecisive character, so much so as to induce the court to say they should have come to a conclusion upon it differing from that of the referee. In such a case it may well be that such evidence should not be received. But when the learned judge in that case states that although, as between man and man, deeds may be explained and reformed by reason either of fraud or mistake, but that the deed of a sheriff cannot thus be reformed, he states a proposition for which I can find no authority in the books, and from which I am constrained to dissent. The only case referred to for this doctrine is *Jackson v. Delancy* (13 John, 539), which certainly decides nothing more than that in a sheriff's deed the land must be described with reasonable certainty. The deed

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in that case having undertaken to convey, with two parcels well described, all the other lands of William Earl of Stirling in the county of Ulster, it was held to be void for uncertainty. No such principle as this was necessary to the decision in the case of *Mason v. White*, which can well stand without its aid; and if fully carried out, this doctrine would place both the certificates and the deeds of sheriffs utterly beyond the reach of the law, although its aid were invoked upon the clearest proof of inadvertence, mistake or fraud.

III. There is no difficulty in this case arising from the provisions of the statute (2 R. S., 302, § 52) requiring bills for relief to be filed within ten years after the cause thereof shall accrue. In the first place, this case does not come within the letter of the statute, which applies to bills filed by a plaintiff for specific relief and not to a defendant resisting an unrighteous claim by an equitable defence. But if it is within its spirit, the statute does not bar the defendant's claim for relief. *Varick v. Edwards* (11 Paige, 290) is a decisive authority to show that when a party to whom land belongs in equity, is in possession and is afterwards evicted by one claiming a legal title, the statute does not begin to run until such eviction. A bill consequently may be filed at any time within ten years after the eviction. Here the plaintiff really had no legal title in the strict sense of the term; and neither the defendant nor any of his predecessors in the occupation and ownership of the land had any reasonable ground even of suspicion, that he would, after the lapse of fourteen years, attempt to put such a construction upon his deed as to disturb a possession so long and so quietly held. The defendant is chargeable neither with knowledge nor notice of any such claim until this suit was brought. The reply alleges that the supposed mistake in the deed was discovered by Moore and the other grantees more than ten years before the commencement of this suit. Of this allegation not a particle of proof was offered upon the trial, and from the very nature of this case it is manifest that none of the parties can be presumed to be chargeable in law with any such knowledge. The judgment should be affirmed.

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All the judges concurred upon both grounds; DENIO, J., preferring to put the judgment upon the construction of the sheriff's deed.

Judgment affirmed.

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The will of Sir William Johnson, made in 1774, asserting his title, under letters patent from the British Crown, to a tract of over ninety thousand acres, called Kingsland, together with recitals in private acts of the legislature, admitting the fact of such a grant and asserting the forfeiture of the estate by reason of the treason of Sir William and some of his devisees held no evidence of the fact that such a grant had been made by the Crown as against a person not shown to claim title under the People of this State by grant subsequent to the Revolution.

There is no presumption against one in possession of land, that his title is derived from the People and not from the Crown of Great Britain or the Colonial Government.

The assertion of title in a deed or will, however ancient, is never evidence in favor of persons claiming under the person who executed the instrument, nor against strangers, except when supported by other proof of a long continued and undisputed possession, in accordance with the title asserted.

The recitals in a public statute are admissible, it seems, in suits between private individuals, only as *prima facie*, and not as conclusive evidence of the facts therein stated; *per* SELDEN, J.

The recitals in a private statute, are, in general, evidence that the facts were so represented to the legislature, and not that they actually existed. Where such recitals appear to be based upon the information of public officers specially charged with the duty of ascertaining the truth of the representations upon which the legislature acted, although they may operate as admissions against the State or its subsequent grantees, they do not affect those who are in no manner parties to them.

A party relying upon historical facts must produce some evidence thereof to the jury. The court, upon appeal from a non-suit, will not take judicial notice of such matter which was not presented upon the trial.

Whether an historical work may be read in evidence while its author is living and might be called as a witness, *Quere*.

A local history, *e. g.*, that of Herkimer county, is not, it seems, admissible evidence. To warrant its introduction, it must relate to such facts as are of a public and general nature, and of interest to the whole State.

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That the letters patent for the Royal Grant, a tract including many thousand acres and now occupied by several thousand persons, were buried in the ground by the descendants of the patentee during the Revolution, and thus perished by decay, is, it seems, a fact which from its nature and the necessity of the case may be proved by tradition.

Such evidence, however, is inadmissible without proof that the residents upon the Royal Grant generally held their possessions and claimed their titles under the alleged patent, and thus had an interest in acquainting themselves with its history.

Jackson v. Lunn (3 John. Ca., 109); *Doe v. Phelps* (9 John., 169), and *Jackson v. Lamb* (7 Cow., 431), considered and distinguished.

APPEAL from the Supreme Court. Ejectment for land in Herkimer county described as being part of Susanna Johnson's three thousand acre tract, in the fourth allotment of the Royal Grant. Upon the trial before Mr. Justice PRATT and a jury, the plaintiffs read in evidence an exemplified copy of the will of Sir William Johnson, dated January, 27, 1774, and which was proved before the surrogate of Tryon county in July, 1774. This will recited that "his present majesty George the Third, was graciously pleased, as a mark of his favour and regard, to give me a patent under the great seal for the tract of land now called Kingsland." It devised to different persons ninety-two thousand acres of that tract, designating it as Kingsland, or the Royal Grant. Among the devisees were the eight natural children of Sir William by his housekeeper Mary Brant, an Indian woman. Susanna, one of these children, was the devisee of three thousand acres, and the plaintiffs proved a chain of conveyances by her and her grantees, one of which, dated April 1st, 1797, was to James Cochran, who conveyed to the father of the plaintiffs. They also proved that fruitless search had been made for the patent to Sir William Johnson, or a copy thereof, in all the State offices in Albany, and in various other public offices in this State. They then called Mr. Ford, who testified that he was a counsellor at law, had resided in Herkimer county forty years, and had been conversant with titles and real property in that county. He knew the tract of land designated as the Royal Grant, which included several towns and parts of towns, and knew the tradition current among the

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settlers on that tract concerning the letters patent. The plaintiffs then proposed to ask him, "what is reported among the settlers of this tract to have been the disposition made of the instrument of letters patent?" The testimony was excluded, and the plaintiffs took an exception.

The plaintiffs then read in evidence two statutes of this State. One, an act for the relief of Jacob Merkle and others, passed February 26, 1797 (3 Greenleaf, 271), recites that "it is represented to the legislature that the Commissioners of Forfeitures for the Western District of this State have, by mistake, sold certain lands in the Royal Grant, belonging to the estates of Peter Johnson, the natural son of Sir William Johnson, Baronet, deceased, as a part of the forfeited estate of Sir John Johnson, Baronet, which lands did of right belong to Susanna Johnson (and others named) the surviving brothers and sisters of the said Peter Johnson as devisees of the said Sir William Johnson, deceased." It further recited that three of such sisters had been convicted of adhering to the enemy and their estates forfeited, and that no record of such conviction and forfeiture existed against the other four, of whom Susanna was one. It provided for the payment of four-sevenths of the proceeds of the sales of such land to certain purchasers from Susanna and the other heirs of Peter Johnson who were not convicted of adhering to the enemy, provided the Attorney-General examined their title and certified its validity. James Cochran was named as one of these alleged purchasers.

The other act was of a similar character, passed March 31, 1798 (Andrews, 480). The plaintiffs here rested, and being nonsuited took an exception. Judgment upon the nonsuit having been affirmed at general term in the fifth district, the plaintiffs appealed to this court.

David Dudley Field, for the appellants, argued, among other things, that the courts should take judicial notice that there was a patent from the British Crown, before the Revolution, of a tract of land known as the Royal Grant. He referred, in addition to the statutes read in evidence upon

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the trial, to several other laws which assume or recognize the ownership by Sir William Johnson of a large tract called the Royal Grant, and that it had been devised by him and the title of some of the devisees forfeited to the People of this State by reason of their treasonable adherence to the Crown during the Revolution. These he insisted were recognitions by the people of this State, the fountain of all titles not derived from previous royal grants, that such a title had vested in the devisees of Sir William Johnson, which was good against the People, except so far as the land had been forfeited by attainder. He also cited some of the documents relating to the Colonial History of this State published by order of the legislature, referring to the Royal Grant. He read from Benton's History of Herkimer county to show the extent and population (several thousands) of the Royal Grant, and a prevailing tradition among its occupants of the manner in which the title had been acquired and the way in which the letters patent had been destroyed, viz.: that having been buried in the earth by the heirs of Sir William Johnson during the Revolution, they had decayed and crumbled into illegible fragments. Finally, he produced a duly authenticated copy from the public records office in London of the original letters patent, which were discovered, since the argument in the Supreme Court, to have been there recorded,

Francis Kernan, for the respondent.

SELDEN, J. The first question presented by this case is, whether it was sufficiently established upon the trial, that Sir William Johnson, prior to his death in 1774, was the proprietor of a tract called the Royal Grant, situated in the now county of Herkimer, and embracing the premises in controversy. His title was claimed to have been derived from a grant directly from the British Crown.

For the purposes of this question I shall assume, that the plaintiffs had made all the search for the original grant of letters patent which the law requires; that they were not bound

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to resort to the government records in London, and that the proof on that subject was sufficient, to entitle them to give secondary evidence of such grant. If then the evidence given on that subject, taken in connection with facts and circumstances of which the court was authorized to take judicial notice, was sufficient to show *prima facie* that the grant or patent in question had ever existed, the nonsuit was wrong, and the judgment should be reversed.

The only evidence actually introduced upon the trial, having any bearing upon the question, consisted in the recitals contained in the will of Sir William Johnson, and the two acts of the legislature passed respectively in February, 1797, and March, 1798. No other evidence was given or offered, having any tendency to establish the existence of the patent; unless some slight weight be attached to the fact stated by Mr. Ford, that there is a tract in Herkimer county, known as the Royal Grant. To establish that such a grant was made, therefore, the counsel for the plaintiff relies: First, upon the recitals in the will. Secondly, upon the two statutes read in evidence; and Thirdly, upon the public history of the period in which Sir William Johnson lived, and especially upon a manuscript memorial addressed to the King, and dated in 1776, published in the Colonial History of this State (vol. 7, p. 839), in which Sir William prays for a grant of the tract in question, of which history, memorial, &c., the counsel claims the court should take judicial notice. As the force of each of these items of evidence depends upon considerations and principles peculiar to itself, they must be separately examined.

The will read upon the trial recites or rather assumes that the testator owned the tract called the Royal Grant, or Kingsland. Is this any evidence of such ownership, in favor of those claiming under the will?

The general rule in regard to recitals in deeds or other instruments is, that they are evidence against the parties executing such deeds or instruments, and those who claim under them, but not in their favor. The admissibility of the recital depends upon the same principles as the admissibility of a

declaration of the party executing the instrument. Such recitals, therefore, are in general no evidence against third persons, who are strangers to the deed or instrument in which they occur.

It is true, that an exception has sometimes been admitted, in cases where the inquiry relates to transactions of an ancient date, and where, in consequence of the loss or destruction, from the lapse of time or other causes, of better evidence, it became necessary to resort to that of a secondary character. A reference, however, to a few of the cases of this class will, I think, show that they differ from this in an essential particular.

In the case of *Doe v. Phelps* (9 John., 169), a deed executed in 1767, by one of several patentees of a tract of land in Otsego county, in which one of the grantors assumed to execute, not only for himself but as attorney for eight other persons, was treated as affording of itself sufficient evidence of the execution of the necessary power of attorney. But it was further proved in that case, that the lots in this patent generally were held under titles derived through this deed; and a witness testified, that the defendant did not pretend to claim any title to the premises. Reliance was placed upon these facts, and the court said: "After a lapse of forty-four years, and *when the possessions have gone along with the deed*, to Van Dam, and where no pretence of claim in opposition to that deed has been heard of, the execution of the power of attorney recited in the deed of 1767 may reasonably be presumed."

So in *Jackson v. Lamb* (7 Cow., 431), where the mutilated fragments of an ancient lease, dated in 1774, which recited that it was given in order to support a release, were allowed to go to the jury as evidence of the execution of the release, but only in connection with proof of possession in accordance with the release claimed. Upon the motion for a new trial SAVAGE, Ch. J., said: "The facts are certainly sufficient to warrant the presumption of a release. The lease for a year, preserved for a long time among Campbell's papers, *the possession of forty years*, upon part of lot No. 1, and the possession of other lots in the patent belonging to the same right, are abundantly sufficient to authorize the presumption."

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But the case which goes as far perhaps as any other to support the position taken here, is that of *Jackson v. Lunn* (3 John. Ca., 109). The action was ejectment for a lot of land in the county of Montgomery. A patent had been granted to several persons in August, 1735, for fourteen thousand acres of land, including the lot in dispute. The lessees of the plaintiff were permitted to prove that their ancestor, Sir Peter Warren, who was not one of the original patentees, claimed in 1736 to own the whole tract, and executed a large number of leases in that year, in which he asserted such ownership. But it was further proved that Sir Peter continued to exercise acts of ownership of the property until the time of his death, and that his heirs did the same after his death, and that his title and that of his heirs was acknowledged by the tenants upon the patent, and remained undisputed until after the year 1783. Under these circumstances, the court held that a conveyance from the original patentees to Sir Peter Warren might be presumed.

That case bears a close resemblance to the present, in this, viz.: The heirs there were suffered to avail themselves, as evidence, of an assertion of title made in a document signed by their ancestor. But the difference in other respects is wide. There the assertion of the ancestor was sustained by possession under an undisputed claim of title for nearly fifty years; and here there is no proof of possession for a single day.

These cases illustrate the rule on this subject, which is, that assertions of title, or claims of ownership made in deeds or wills, may in some rare cases be evidence in favor of persons claiming under the grantor or testator by whom such deed or will was executed, but only in connection with other proof of a long continued and undisputed possession, in accordance with the right or title claimed. Here there was no such proof, and I see nothing to take this case out of the general rule, that recitals or assertions contained in any deed or other written instrument, are never evidence in favor of the party who executes the deed, &c.; or any person claiming under him, nor against strangers.

The next question is, whether the two acts of the legislature read in evidence, afforded any proof of the existence of the grant.

That the preambles to public statutes are admissible in suits between private individuals, as evidence of the facts recited in them, may perhaps be conceded (*Rex v. Sutton*, 4 M. & S., 582); although in such cases the evidence, I apprehend, is *prima facie* only, and not conclusive. But private statutes have never been held admissible against parties in no way connected with such statutes. Evidence of this description was rejected by the Court of King's Bench in the case of *Brett v. Beales* (1 Mood. & Mal., 416), although the act in that case expressly provided, that it "should be deemed and taken to be a *public* act," and should be "judicially taken notice of as such by all judges, justices and others, without being specially pleaded."

The objections to such evidence are well stated in the case of *Elmendorf v. Carmichael* (3 Litt. R., 472). The court there say: "The facts recited in the preamble of a private statute, may be evidence between the Commonwealth and the applicant or party for whose benefit the act passed. But as between the applicant and another individual whose rights are affected, the facts recited ought not to be evidence. * * * * * Once adopt the principle that such facts are conclusive, or even *prima facie* evidence against private rights, and many individual controversies may be prejudiced and drawn from the functions of the judiciary, into the vortex of legislative usurpation. * * * * * Such a preamble is evidence that the facts were so represented to the legislature, and not that they really existed."

All who are familiar with the general course of legislation, will readily concur in the conclusion arrived at in this case. It is true, that in the case before us, we have much greater reason to place confidence in the accuracy of the facts recited and assumed in the acts read in evidence, than in the case of most private acts; for the reason that here was a body of public officers called the Commissioners of Forfeitures, whose special duty it was to inquire into and ascertain the truth of the rep-

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resentation upon which the legislature acted. Still, the principle is not changed. The acts are *res inter alios acta*, and cannot affect those who are in no manner parties to them. Under certain circumstances these acts might have been very satisfactory evidence in this case. They would undoubtedly operate as admissions by the People of the State that the tract known as the Royal Grant did belong to the devisees of Sir William Johnson. If, therefore, it appeared that the defendant claimed by virtue of a title derived from the State since the Revolution, the evidence would have been admissible against him. But this fact cannot be presumed. Grants may have been made by the King, or by the Colonial Governors, to other persons as well as to Sir William, under some of whom the defendant may claim. There is neither fact nor circumstance in the case from which anything can be inferred on this subject; and the burden rested upon the plaintiffs to show the proof admissible. The acts in question therefore, if objected to, could not have been read in evidence; and although read without objection, they prove nothing as against the defendant.

The plaintiffs' title, therefore, derives no support from the proof actually given upon the trial; and it only remains upon this branch of the case, to see whether the historical evidence relied upon is sufficient to establish it.

There are several very conclusive objections to this evidence. In the first place, it was not introduced or offered upon the trial. There are no doubt cases in which courts, upon questions addressed to them, may take judicial notice of matters of general history and of public and universal notoriety, which admit of no dispute. But upon the trial of issues of fact by a jury, if reliance is placed upon any matters of this sort, some evidence of them must be adduced.† In all the early cases on the subject, the histories relied upon were produced at the trial. Thus in the case of *St. Catharine's Hospital* (1 Vent., 149), where the question was, as to the right of a Queen Dowager to appoint a master of the hospital; it having been decided in 4 Edw., 3, that she had no such right, Lord HALE allowed it to be "*shown out of Speed's Chronicles, produced in court, that*

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Queen Isabel was under great calamity and oppression, and what was then determined against her, was not so much from the right of the thing as the iniquity of the times." So in the case of *Lord Brounker v. Sir R. Atkins* (Skin., 14), "Speed's Chronicles, was given in evidence, to prove the death of Isabel, Queen Dowager of Edward 2."

This point was directly considered by the Court of Appeals of Virginia, in the case of *Gregory v. Baugh* (4 Rand., 611), which was an action brought by Baugh to recover his freedom. The case turned upon the question, whether the plaintiff was of Indian descent; and the judge at the trial had charged the jury, that "it was a question to be decided upon probabilities and circumstances, among which it was lawful for the jury to consider *facts connected with the history of the country*, as if formally proved to them."

Judge CARR, in delivering the opinion of the court, after quoting this part of the charge, says: "This I presume cannot mean, that the jury are to consider such facts as if formally proved, *when proved*; but that *without proof*, they are to consider them as if formally proved; that is, that each juror might take any facts as formally proved, which he may have heard of in a way to satisfy his mind, and might consider as connected with the history of the country. If this be the meaning, it is contrary to law; for it is laid down in all the books, that there must be some proof adduced of historical facts." There is no doubt, I think, that the rule is as here stated. That it should be so, is obvious; not only in order that the jury may all be equally possessed of the evidence from which their conclusions are to be drawn, but that the facts upon which their conduct is based may be known.

Another objection to this evidence is, that Benton's History of Herkimer County, from which most of the facts relied upon are drawn, would not have been admissible in evidence if offered upon the trial. First, it is doubtful whether any historical work can be read in evidence, while the author is living, and can be called as a witness to state the sources of his knowledge. (*Morris v. Lessee of Harmer's heirs*, 7 Peters, 554.)

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Another objection is, that it was not a general, but a mere local history. In the case of *Evans v. Getting* (6 Carr. & Payne, 586), where the question was as to the boundaries between two counties, the plaintiff proposed to read from Nichol's History of Brecknockshire to show the boundaries of that county, but Baron ALDERSON, before whom the trial was had, said: "This is a history of Brecknockshire. The writer of this history probably had the same interest in enlarging the boundaries of the county, as any other inhabitant of it. It is not like a general history of Wales. I shall not receive it." It may with equal propriety be said here, the writer of Benton's History may have had an interest in establishing the title to the Royal Grant. This kind of evidence is only received from necessity, and should be strictly guarded.

But a more conclusive objection to any mere historical evidence in this case is, that such evidence is only admissible to prove facts of a general and public nature; and not those which concern individuals or mere local communities. In the case of *Staines v. Burgessess of Droitwich* (1 Salk., 281), Camden's *Britannia* was offered in evidence upon a question as to the custom of Droitwich; but the court refused to receive it, holding that "a general history might be given in evidence to prove a matter relating to the kingdom in general, because the nature of the thing requires it, but not to prove a particular right or custom." So in the case of *Morris v. Lessee of Harmer's heirs, supra*, the court says: "Historical facts of general and public notoriety, may indeed be proved by reputation; and reputation may be established by historical works of known character and accuracy." So in a late case in this State, viz.: *Bogardus v. Trinity Church* (4 Sand. Ch. R., 633, 724), the Vice-Chancellor, speaking of evidence derived from public records, statutes, legislative journals, historical works, &c., says that it is "restricted as to historical evidence to facts of a public and general nature." There is indeed no doubt that it is strictly confined to facts of this sort. History is only admissible to prove history, that is, such facts as being matters of interest to a whole people, are usually incorporated in a general history of the state or nation.

The historical evidence relied upon, therefore, even had it been offered upon the trial, could not have been received, with the exception perhaps of the memorial of Sir William Johnson to the King, published in volume 7 of the Colonial History of the State. I am inclined to think, that had a proper foundation been laid for the introduction of this document, by showing, that the tract known as the Royal Grant had been generally possessed and occupied from the time of Sir William's death, under a claim of title derived from him, that both this memorial and the will of Sir William would not only have been admissible, but sufficient perhaps to authorize the jury to presume that a patent had been issued pursuant to the prayer of the memorial. But such a document must clearly be introduced upon the trial; and could no more be taken notice of without proof, than the patent itself, if one was issued pursuant to its request. The conclusion from these views is, that there was no evidence actually introduced upon the trial, nor any which the jury had a right to consider, which has any tendency to establish the fact that the grant in question had ever been made.

The only remaining question is, whether the court erred in rejecting the question put to the witness Ford, in respect to the common report among the settlers upon the Royal Grant, as to the disposition which had been made of the letters patent.

The answer to this question, if admitted, would have been wholly immaterial, unless accompanied by proof that the patent had once existed; and no such proof was given. But as it may be said that when this question was asked and rejected the proof was not closed, and that if the answer had been received, the plaintiff might afterwards have given evidence of the execution of the letters patent, I will briefly consider the point.

That hearsay or reputation is admissible as evidence, upon questions of pedigree or family relationship, and also upon questions respecting the boundaries of lands, is a familiar doctrine. But there are, no doubt, other cases in which the same kind of evidence may be received, for the purpose of establishing a mere private right, when the fact to be proved

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is one of a *quasi* public nature, that is, one which interests a multitude of people, or an entire community; and it seems to me that this case is one that might fairly be considered as falling within the latter class. The Royal Grant, as it is called, is an extensive tract, embracing an entire township and parts of several others; and everything relating to the original document upon which the title depended, would necessarily affect the interests of every occupant of the tract. Again, the fact sought to be proved, viz.: the burying in the ground, by the descendants of Sir William Johnson, of the muniments of his title, is one which would scarcely be susceptible of any other kind of proof. Of too ancient a date to be proved by eye-witnesses, and not of a character to be made a matter of public record, unless it could be proved by tradition there would seem to be no mode in which it could be established. It is a universal rule, founded in necessity, that the best evidence of which the nature of the case admits is always receivable. Hence, had a proper foundation been laid for the proof in this case, I should have thought it admissible. But it is always a condition to the introduction of evidence of reputation in such cases, that it should appear to come from persons who may justly be supposed to have had some knowledge on the subject. The doctrine is very clearly stated, and the reasons for it given, by Professor Greenleaf in his work upon Evidence (§ 128). After stating that upon questions of a *strictly* public nature "all persons must be presumed conversant" with the facts; and hence that in such matters, "in which all are concerned, reputation from any one appears to be receivable;" he proceeds to say: "On the contrary, when the fact in controversy is one in which all the members of the community have not an interest, but those only who live in a particular district, or adventure in a particular enterprise, or the like, hearsay from persons wholly unconnected with the place or business would not only be of no value, but altogether inadmissible." Again, he says: (§ 137) "The probable want of *competent knowledge*, is the reason generally assigned for rejecting evidence of reputation, or common fame, in matters of mere private right."

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In most cases involving questions of fact affecting particular localities, as towns, counties, manors or the like, it would be sufficient to show that the reputation or tradition offered in evidence was derived from persons inhabiting the particular town or district. But here that is not enough; because, unless the residents upon the Royal Grant claim to hold their lands under and by virtue of the patent in question, they would have no special interest in acquainting themselves with its history; and consequently no presumption would exist, that they possessed that peculiar knowledge on the subject, which is always required in order to let in proof of this kind. For the reason, therefore, that it was not shown that the settlers upon the tract known as the Royal Grant generally held their possessions and claimed their titles under Sir William Johnson or his devisees, the question put to Mr. Ford was, in my opinion, properly rejected.

The judgment of the Supreme Court should therefore be affirmed.

All the judges concurring,

Judgment affirmed.

CONDIT v. BALDWIN *et al.*

An agent entrusted with money to invest at legal interest exacted a bonus for himself as the condition of making a loan, without the knowledge or authority of his principal: *Held*, that this did not constitute usury in the principal nor affect the security in his hands.

APPEAL from the Supreme Court. Action on a promissory note. Defence, usury. On the trial before the court a jury having been waived, these facts appeared: The plaintiff resided in the State of New Jersey, and the defendants at Newark in Wayne county. The plaintiff placed in the hands of S. K. Williams, an attorney and counsellor at law, also residing at

21	219
109	477
31	319
114	487
21	219
130	107
21	219
150	368

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Newark, the sum of \$400, to invest for her at lawful interest. On or about the 1st of May, 1851, the defendant Baldwin made application to Mr. George C. Mills, also residing in Newark, to procure a loan for him for \$400, for two years, on his note with the other defendants as sureties. Mills agreed to make the effort and applied to Williams to obtain the loan. Williams said he had the amount wanted, to loan for a lady in New Jersey, but he preferred to loan the money on bond and mortgage, as in that event he should receive to his advantage compensation for drawing bond and mortgage and examining the title to the property mortgaged. Mills stated that the money was wanted on a note, and who would be the parties to it, and that Baldwin had offered to compensate him for procuring the loan, and it was agreed between Mills and Williams that if Williams would lend the money on the note he should have \$25 as attorney's fees. Williams then agreed to make the loan. Mills called afterwards upon Williams with the note, and Williams gave him his check for the \$400 which was paid. Mills handed Baldwin the \$400; on being asked by him what were the charges, Mills replied \$40, which Baldwin then paid to him. Baldwin did not know how it was disposed of by Mills, who kept for himself \$15, and paid Williams \$25. Judgment was ordered in favor of the plaintiff for the amount of the note and interest, and on appeal was affirmed at general term in the seventh district. The defendants appealed to this court.

Frederick E. Cornwell, for the appellants.

Henry R. Selden, for the respondent.

DAVIES, J. The statutes of this State prohibit any person from taking or receiving for the loan of money more than seven per cent per annum. They also provide that any person who shall pay or deliver in money, goods, &c., on such loan, any greater sum than is thus allowed, may recover in an action against the person who shall have taken or received the same,

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the excess of interest so paid. It is also provided that any person who shall receive any greater interest, discount or consideration than is prescribed, shall be deemed guilty of a misdemeanor, and on conviction shall be punished by fine or imprisonment, or both. (1 R. S., 772, &c., §§ 2, 3, 15.) And by section 5, all notes, &c., taken on such usurious loans are declared void. In the present case it is not alleged or pretended that the plaintiff has personally taken or received any illegal interest on the loan made to the defendants, or that she had any knowledge, until the trial of this cause, of the secret arrangement made by Mills, the agent of Baldwin the borrower, with Williams her attorney and agent, whereby the latter received a *douceur* for his private and exclusive benefit. The plaintiff, a non-resident of the State, sends her money here to invest, according to the laws of this State. All the authority given to Williams as her agent and attorney, to transact the business of his principal must, in the absence of any counter proof, be construed to transact it according to the laws of the place where it was to be exercised. The law will never presume that parties intend to violate its precepts. (*Owings v. Hull*, 9 Peters, 607.)

It is the essence of an usurious transaction, that there shall be an unlawful and corrupt intent, on the part of the lender, to take illegal interest, and so we must find before we can pronounce the transaction to be usurious. (*Nourse v. Prime*, 7 John. Ch. Rep., 77.) In *Bank of United States v. Waggener et al.* (9 Peters, 399), STORY, Justice, in delivering the opinion of the court, says, that to constitute usury within the prohibitions of the law there must be an intention knowingly to contract for or take usurious interest; for if neither party intend it, but act *bona fide* and innocently, the law will not infer a corrupt agreement. When, indeed, the contract upon its very face imports usury, as by an express reservation of more than legal interest, there is no room for presumption, for the intent is apparent, *res ipsa loquitur*. But when the contract on its face is for legal interest only, then it must be proved that there was some corrupt agreement, or device or shift to cover usury,

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and that it was in the full contemplation of the parties. In support of these propositions numerous authorities are cited. In this case there is nothing on the face of the contract, reserving more than legal interest. The real parties to the transaction are the plaintiff and the defendants; and to render the transaction usurious, there must have been a corrupt agreement, an *aggregatio mentium*. It is not sufficient that the defendants intended to make it usurious, so that when called on to return the money thus obtained by a fraudulent device, they could pay it by availing themselves of the protection of the statute. The intention to take the usury, must have been in the full contemplation of the parties, not of one party but of both, to the transaction. Now we have seen that the plaintiff never intended to violate the law; never authorized any such violation, and never knew or had any intimation that her agent or attorney had violated it. Can it be truly said, that the plaintiff has ever made the usurious agreement, which it is essential to find was made by her before we can sustain the defence in this cause? It is not pretended she made it herself, but it is said it was made by her agent and therefore it is her agreement, and she must suffer the consequences of his acts. This is upon the trite maxim, *qui facit per alium, facit per se*. The authority given to the agent was, as has been shown, to loan her money at legal interest and according to the laws of this State. But the agent, instead of adhering to his instructions, at the solicitation of the defendant Baldwin's agent, departs from these instructions and violates the law. Is this the act of the principal, by which she can be bound?

If a master command his servant to do what is lawful and he do an unlawful act, the master shall not answer, but the servant for his own misbehavior; otherwise it would be in the power of every servant to subject his master to what actions or penalties he pleased. (Bac. Ab., *title* Mast. & Serv. [L].) In *Middleton v. Fowler* (1 Salk., 282), HOLT, Ch. J., places the law upon its proper foundation, when he states it as a general position, that no master is chargeable with the act of his servant, but

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when he acts in the execution of the authority given him. In other words, when a servant quits sight of the object for which he was employed, and without reference to his master's business or orders, commits from his own malice some willful and independent act, he is no longer presumed to be acting in pursuance of his general authority as a servant, and his master is not responsible for the act which he does. The rule that when an agent commits a wrong in the transaction of the business of his principal, the principal is liable for the injury produced by such wrong, has no application to the present case. That rule cannot apply where the agent when committing the wrong is bargaining on his own account, for his own private advantage exclusively, and this is known to the person with whom he is bargaining. It could only apply where the person dealt with is deceived or wronged, which in no sense is the present case. Baldwin's agent was not misled or deceived by any act of the plaintiff's agent. He well knew that in reference to the \$25, Williams was acting and contracting on his own behalf and for his own benefit exclusively. He did not assume in that matter to act for or represent the plaintiff, or that what he was doing was in any manner to enure to her benefit or advantage. In this case, Williams availed himself of his position as the plaintiff's agent, to make a contract on his own account and for his own individual benefit. In thus dealing he did not act or assume to act as the plaintiff's agent. He required compensation for a service which he alleged he rendered to Baldwin. It was his individual affair, not that of the plaintiff, and if it was a shift or device on his part to take and receive usurious interest to himself on this loan, he has subjected himself to the penalties of the statute. (3 Hawk's Rep., 28; *Com. v. Frost*, 5 Mass., 53.) It was conceded on the argument that the plaintiff had not subjected herself to an indictment for misdemeanor: that she was not liable *criminaliter* for these acts of her agent. Does not this concede too much on the part of the defendants? Is it not a concession that she has not taken and received any usurious interest on this loan. If so, how can it be contended that she has forfeited her money loaned, so far as she is con-

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cerned, legally? The agent has taken and received the gratuity or usury, and not the principal. To render the transaction usurious as to this plaintiff, we have to establish that she took and received the unlawful interest, and from this fact we infer the corrupt intent. Now in the present case it is undeniable that Williams himself took and received the \$25, paid for alleged services rendered by him. If he took it and received it as the plaintiff's agent, then he took and received it for her and as her money. But on the facts disclosed in this case, can it be for a moment contended that the plaintiff could have recovered this money from Williams as so much money paid to him for her use? Clearly not. Again, by the third section of the statute cited (*supra*), it is provided that if any person shall pay any greater sum for the loan of money than is allowed by law, he may recover such excess beyond the legal rate of interest in an action against the person who shall have taken and received the same. Baldwin had an action, therefore, to recover this excess; but against whom could he have maintained it? Certainly not against the plaintiff. She never took or received it. Her agent was never authorized to take and receive it. On no principle could the action have been maintained against her; and it is equally clear that it could have been against Williams, if it was a shift to cover usury, for he was the person who took and received it, and retained it and applied it to his own use. We think these tests conclusively show, that the plaintiff did not take or receive, or agree to take or receive on this loan of \$400, any greater sum than the legal rate of interest, and that the defence of usury is not sustained.

But it is urged with great earnestness and ability, that the plaintiff, by accepting the note and commencing this suit upon it, has ratified all the acts of her agent, connected with the loan and attendant upon its inception. We have looked carefully at all the authorities cited by the learned counsel for the defendants, and we think they fail to sustain the proposition contended for. The plaintiff, by receiving and accepting the note for the amount of her money, and which she loaned through her agent,

only ratified the contract of loan at the rate of interest expressed in the note. She had no knowledge of, and cannot be held to have ratified the payment by Baldwin's agent to Williams, of the \$25, usuriously by him taken as is said. We think the cases fully sustain this view of the plaintiff's act, in receiving the note and commencing suit thereon.

When an act is done for another, by a person not assuming to act for himself but for such other person, though without any precedent authority whatever, it becomes the act of the principal if subsequently ratified by him. In that case the principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded on contract or tort, to the same extent and with all the consequences as if done by previous authority. But when the agent did not assume to act for another, but acted for himself and for his own benefit, a subsequent ratification does not bind the principal. (*Wilson v. Tumman*, 6 Man. & Gr., 238.) Where a landlord authorized a bailiff to distrain for rent due from his tenant, directing him not to take anything except on the demised premises, and the bailiff distrained cattle of another, supposing them to be the tenant's, beyond the boundary of the farm, and the cattle thus taken were sold, and the landlord received the proceeds, the landlord was held not to be liable in trover for the value of the cattle, unless it was found that he ratified the act of the bailiff with knowledge of the irregularity, or chose without inquiry to take the risk upon himself and to adopt the whole act; and it was also held that by adopting and ratifying what he had authorized, he did not adopt and ratify the unauthorized acts of his agent. In *Bush v. Buckingham* (2 Ventris, 83), the plaintiff made a loan of £50, at a legal rate of interest. She referred the borrower to her scrivener who would draw the bond to secure the loan, and the scrivener, in error and against her will, included therein more than lawful interest. In a suit on the bond the defendant interposed the defence of usury, but it was overruled as there was no intent on her part to take or receive more than lawful interest; and it was held that by commencing suit on the bond

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she did not ratify the act of her agent, in providing for the payment of more than legal interest, but that she might recover the amount loaned with lawful interest. In *Buckley v. Guildbank* (Cro. Jas., 678), it was resolved that a bond given on the 23d of May, 1617, on loan of £120 conditioned for the payment of £132 upon the 24th of May next ensuing, was for the payment of that sum on the next day, and therefore on its face usurious, and it was held, that forasmuch as the agreement is found to be to make the loan for a year, and that the assurances were for the payment at the end of the year, and as by the scrivener's mistake it is made payable the next day, it is not usury within the statute, for there was not any corrupt agreement betwixt them, and the act of a stranger shall not bring him within the danger of the statute, especially it being found that he did not require payment until the end of the year. *Neveson v. Whitley* (Cro. Chas., 501), was an action of debt on bond for £100, dated 12th July, with condition for the payment of £58 at the end of six months. The defendant pleaded the statute of usury, and that the obligation was void. The plaintiff replied that he lent the money for a year, and that the defendant should pay £8 for the forbearance for a year, and that the plaintiff would not demand it until the expiration of a year, and by the scrivener's mistake it was made payable at the half year's end, and he not knowing thereof accepted the bond. It was objected that this allegation was against the words of the bond. But the whole court held, the plaintiff might well make the allegation, for it is showing the true agreement that no interest was to be paid by said agreement but such as stood with the law. The case of *Baxter v. Buck* (10 Vt. Rep., 548), is not unlike the present. The plaintiff, as administratrix of William Baxter, held a note of \$250, made by the defendant, and the same was presented to him for payment by her son Portus Baxter. On that occasion a new note was given by the defendant for the same amount, and the time of payment was agreed to be extended by Portus Baxter, on the defendant agreeing to pay twelve per cent interest on the amount of the note, which he did by giving his note to Portus

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Baxter for such interest. The court held that this note for the usurious interest was taken by Portus without the consent or knowledge of the plaintiff, and inasmuch as there was a *bona fide* debt due to her, and the note in suit was only for the just amount due, it would not be void if Portus Baxter, without her consent, received a note to himself for any further sum.

The appellant's counsel relies with much confidence upon the case of *Austin v. Harrington* (28 Vt. Rep., 180). A careful examination of that case will show that it is not in conflict with what was decided in *Baxter v. Buck* (*supra*). In this case the court affirm the rule laid down in that, and say it was a case of a limited or special agency, in which the employment was only for that single transaction, and where the principal was not bound by any act of the agent, not expressly authorized by her. The court say they have no occasion to question the soundness of that decision, as the case then under consideration was not one of that character. It was that of the dealings of a general agent in the transaction of her business, and being such general agent, the plaintiff, with full knowledge of all the facts, had ratified his act.

In any view which we have taken of this case, we do not see that the \$25 paid to Williams was for the benefit of the plaintiff, or that she had any interest whatever in it. While we intend to uphold the law prohibiting the taking of usury, in its integrity, so long as it remains on the statute book, we are not called upon to punish the innocent, at the call of a confessedly guilty party who has enticed her agent into a violation of the statute, which is now sought to be availed of to defraud her of money undeniably hers, and loaned, so far as she is personally concerned, in good faith, and upon such an agreement on her part "as stood with the law."

The judgment appealed from should be affirmed.

Selden, Clerke, Wright and Bacon, Js., concurred.

COMSTOCK, Ch. J. (Dissenting.) While the statutes of usury are in force, they ought to be faithfully interpreted and admin-

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entered by the court. The decision of this case will, I am apprehensive, go far to overthrow them. I therefore dissent, and proceed, briefly as may be, to state my reasons.

The plaintiff loaned her money through her agent, Williams. He was wholly and exclusively her agent, because he performed no service whatsoever for the borrower. He performed, indeed, no act which is not involved in every loan. He formed the mental conclusion to accept the note of the borrower and his sureties: he accepted the note and advanced the money. There was simply a process of the mind or will, and the act of lending. Without these circumstances no loan was ever made. If \$25, or any other sum beyond lawful interest, can be charged to the borrower in such a case, there is very little left of the laws against usury.

It is too plain for argument, and, indeed, it is not denied, that the contract was usurious, provided the plaintiff had authorized her agent to contract precisely as he did. The agreement in brief was, that the agent should lend \$400 on the note of the borrower, with four other signers as sureties: that the note should be given on interest; and that the agent should be paid the sum of \$25, under the name of an attorney's fee. The loan was consummated on these terms. The note was delivered, the \$400 advanced, and \$25 was paid back to the plaintiff's agent. It is not pretended that the name given to this exaction alters the nature of the transaction. It was called a fee, but the agent earned no such fee. He did nothing which is not done by every person who lends money on a note. I fully concede that the agent of a money lender may also be employed to perform services for a borrower, and that such services may be lawfully compensated. The examination of a borrower's title, where landed security is given, is a familiar example of this sort. But not a single authority can be found which holds that compensation can be claimed for services where the lender or his agent simply accepts a note and advances the money. More need not be said on this point, because, in the very full and able argument before us, no attempt was made to sustain the contract on this theory. No plea of services has

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been interposed to shield the transaction from the condemnation of the statute.

It is equally plain that the validity or invalidity of the contract cannot depend on the mere mode and form in which the business was closed. In fact the \$400 was advanced, being the full face of the note, and the borrower afterwards paid the bonus of \$25, as he had agreed. The legal as well as the practical effect of this was precisely the same as if the \$25 had been retained in the first instance and only \$375 advanced. The result was that the borrower received only the last mentioned sum for his note. I am not able to see that the possession of the whole sum for a few moments or a few hours could benefit him, so long as he was to pay back a part of it. The usury was in the agreement to pay a bonus over and above lawful interest. Whether it should be deducted out of the fund loaned at the moment of the loan, or should be paid another day, could make no difference. Devices of this sort never before deceived any court.

I think it material next to observe that only one contract was made which embraced the whole transaction. There was no agreement, between the plaintiff through her agent, and the borrower, to lend \$400 at lawful interest, and then a separate and distinct agreement between the agent and the borrower for the extra \$25. It was all included in one contract. The agent said in substance, "I will lend you the \$400 if, besides the legal interest which you pay to my principal, you will pay to me the sum of \$25." This was a single indivisible proposition, and as such it was accepted by the borrower. In consideration of the loan he agreed to repay it at a certain day with interest, and he agreed also to pay \$25 more to the lender's agent. Here was one consideration and one agreement. That agreement might all have been expressed in one or in two writings, or it might have been without any writing. In fact, one of these promises was evidenced by a promissory note, the other rested in parol. These circumstances are immaterial. There was but one original agreement, which included the whole subject,

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Where there is usury at the root of a transaction, it has never before been thought that the merely formal separation of the borrower's contract into different parts could take the case out of the statute. If the business had not been done through an agent, not a doubt would be entertained, because nothing is clearer in principle or better settled by authority than that contracts are equally usurious whether the excessive interest be paid down or only agreed to be paid, and whether the payment be promised in the same instrument with the principal debt or in a collateral agreement, oral or written. The test question always is, whether the agreement for the loan includes more than lawful interest to be reserved or taken in any manner whatsoever. Authorities need not be cited in support of a proposition so well understood.

The contract in question, therefore, had all the elements of usury unless it can be saved from condemnation by the single circumstance that the agent had no authority from his principal to lend her money at a higher rate of interest than is allowed by the law of the State. Upon this precise ground the whole argument for the plaintiff rests. There is no evidence in the case that she authorized her money to be lent in violation of the statute; and I admit such an authority ought not to be presumed from the mere act of the agent himself. But what I have to say on this point is, that the assumed defect in the agent's power to make just such a contract as he did make does not alter the contract itself. Such a circumstance cannot transform that into an innocent and valid agreement which in its own essential nature and judged by its own terms was usurious and void. The agreement was the same whether we regard it as made with or without due authority. It was a plain contract for more than seven per cent interest, and it does not become a different contract although we admit that the plaintiff did not authorize it to be made just as it was in fact made. If her agent exceeded his authority and thereby subjected her to loss she has a plain remedy against him. So on the same ground she may, I do not doubt, repudiate the contract altogether and demand and recover from the borrower her money

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which went into his hands without her consent. This remedy was open to her the moment the borrower got possession of the fund in this unauthorized manner. It is a remedy open to her now. But such is not the theory of her action. She sues, not in repudiation of the unlawful contract but upon the very contract itself, and she claims to hold not only the principal maker of the note but four other persons who were sureties merely, and, therefore, never had any money which belonged to her. In short, she asserts the validity of the contract. If she fails in that assertion she cannot recover. We have shown that it was an illegal and void contract, judged by its own nature and terms and according to every test hitherto known.

It is argued, however, that as the agent's exaction of \$25 was not authorized by the plaintiff, she can disavow that part of the transaction and still recover on the note which represents, it is said, the sum actually lent. But the note represents more than the sum lent. It is true that the borrower in form received the \$400 expressed in the note, but this was subject to a condition that he should presently pay back to the agent the sum of \$25, and he paid it back accordingly. The sum really loaned was, therefore, only \$375. That, stripped of all disguise, was the true consideration of the promise made by the borrower and his sureties to pay \$400 and the interest thereon.

But again, how can the plaintiff divide an entire contract, as this was, into two parts, and so adopt one part while she rejects the other. If an agent contracts in excess of his authority, the principal is not bound at all and may repudiate the whole. But if he adopts a part he adopts the whole. Mr. Justice STORY lays down the rule thus, and he cites many authorities to support it: "The principal cannot, of his own mere authority, ratify a transaction in part and repudiate it as to the rest. He must either adopt the whole or none. And hence the general rule is declared that where a ratification is established as to a part, it operates as a confirmation of the whole of that particular transaction of the agent." (Story on Agency, § 250.) The result of this rule is that the plaintiff, if she insists upon

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the contract at all, must take it with all its vices and infirmities. She is not permitted to say that the usury is one particular part or clause of the agreement which she disavows, and that she will take the benefit of the residue which is innocent and lawful. I have shown, I think, the unity of this contract. Its substance and nature were the same as though the borrower had by the very terms of his note promised not only to pay the \$400 and interest but also the \$25 which the agent received. Could the principal recover on such a note by rejecting from the contract one of its clauses which contaminated the whole? If usury can thus be eliminated from contracts, borrowers are henceforth at the mercy of agents, to whose exactions no limits can be assigned. The principal has only to disavow the extortion, and the contract, which in its very letter is condemned by the statute, become a lawful one. The legislature has declared that "all contracts whatsoever, whereupon or whereby there shall be reserved or taken or secured to be reserved or taken any sum or value for the loan or forbearance of money," greater than the prescribed rate of interest, "shall be void." (1 R. S., 772, § 5.) This enactment makes no distinction between the principal and the agent, and none can be found in the analogies of the law. We have held, at this very term of the court, that a principal is liable for the representations of his agent made in the course of a negotiation for the sale of land, although they were made without his authority or knowledge. We thought it plain that the principal could escape the consequences of his agent's conduct only by disavowing the transaction altogether, which he had not done. (*Bennett v. Judson*, post, p. 288.)

Very little need be said in regard to the authorities cited in support of this transaction. In general, they do not bear upon the question. For example, the case of *Bush v. Buckingham* (2 Ventris, 88), turned upon a mistake of the scrivener in preparing the bond by which the loan was secured. The bond sued upon reserved on its face more than lawful interest on the sum loaned, and the obligor pleaded that it was corruptly agreed, &c. The replication took issue on the corrupt agree-

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ment, and showed that the agreement as made between the parties was free from usury; that a scrivener was employed to draw the bond and that too large a sum was inserted *ex errore scriptoris*, that is by the scrivener's mistake. The replication was held good. Now, no one ever supposed that usury could be alleged where the excessive interest was reserved in the security, or deducted from it, in consequence of an innocent mistake, either of the principal parties or an agent. Several of the cases relied upon belong to this class, and they do not require any additional comment. Other authorities have been referred to for the purpose of showing that principals are not bound by the unauthorized acts of agents; that to constitute usury there must be a corrupt agreement: that there must be an *aggregationem* or meeting of the minds of the parties, &c. These are truisms which no one disputes; but they have little to do with the question before us. There can be no question about an agent's authority when the principal himself insists upon the contract. If the agent is guilty of fraud or usury, the principal must either disavow the dealing or take all the consequences. He cannot make a different contract by excising the vices which enter into and form a part of it. This is the difficulty which has not been overcome by argument or authority.

Believing that this is a plain case of usury, I think the judgment should be reversed and a new trial granted.

DENIO and WELLES, Js., concurred in this opinion.

Judgment affirmed.

Trustees of First Baptist Society in Syracuse v. Robinson.

TRUSTEES OF FIRST BAPTIST SOCIETY IN SYRACUSE v.
ROBINSON.

An agreement to give towards building a church a lease of a house for three years, "which at present rent is \$516," expressing no consideration, but appearing among the signatures to a subscription for that purpose which expressed a valid consideration, construed as a subscription for the amount of the rent.

The reference to the lease does not make an agreement to demise the house, but merely designates the fund by which the subscription was measured, and from which the defendant expected to pay it.

APPEAL from the Supreme Court. Action to recover the amount of a subscription for erecting a church. On the trial before a referee, the plaintiff proved the signature of the defendant to a subscription paper, which commences by reciting the disposition of the signers to contribute towards the building of a new church, and the receipt of one dollar, by each of them, from the plaintiff, in consideration of which each individually and severally agreed to pay the sum set opposite to his name in six installments, payable with interest at specified dates; with a provision that each subscriber who, upon the completion of the church, should purchase a pew, should be credited towards paying therefor with the amount paid upon his subscription. It was dated December 23, 1847, and the first installment of the subscriptions was payable in July succeeding. After the signatures of five persons were these words written across the paper and subscribed by the defendant, "I agree to give a lease of my house on Genesee street, which now rents for \$172 a year for three years, towards building a new Baptist church in Syracuse, and will pay village tax and insurance; which at present rent, \$516.

"W. A. ROBINSON, Jr."

Then followed the signatures of some sixty subscribers, for sums varying from \$25 to \$250 each.

The defendant objected to the reading in evidence any portion of the subscription paper except the words above quoted, immediately preceding the defendant's signature. The referee overruled the objection, and received the entire paper, under exception by the defendant. There was evidence that the defendant had been called upon for the first installment of his subscription in 1848, and again in 1851 or 1852, when the entire subscription was demanded. He declined to pay, upon the ground, among others, that he subscribed upon the condition the church should be erected upon a different site than that on which it was actually located. There was no demand of a lease nor any offer by the defendant to execute one. There was evidence on the part of the plaintiff tending to show that the defendant rented his house for a trifle more than \$172 per annum. There was a motion for a nonsuit, upon grounds sufficiently appearing in the following opinion. It was denied, and the defendant excepted. Judgment was entered upon the referee's report in favor of the plaintiff for \$516 and interest. The judgment having been affirmed at general term in the fifth district, the defendant appealed to this court.

James Noxon, for the appellant.

Samuel N. Holmes, for the respondent.

WRIGHT, J. It is not claimed that if the defendant became a party, with others, to the agreement to contribute to the erection of the new church edifice of the plaintiffs, he can avoid payment of his subscription on the ground that such agreement was without consideration. There is a sufficient consideration expressed in the instrument to uphold the promise to pay of the subscribers to it. The position assumed is, that he never became a party with others to any agreement to contribute towards the erection of the church; but that he made a distinct and independent one for himself, which, though written on the subscription paper under the signatures of other subscribers, was not connected with nor formed any part of the

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instrument subscribed by the others; and that such independent agreement is void for want of consideration. This position, I think, is untenable. The paper signed by the defendant and some sixty other persons is to be regarded, as the subscribers thereto plainly intended it should be, as one instrument; and the words prefixed to the signature of the defendant are not to be construed as an independent agreement with him, written on the subscription paper but not intended by the parties to have any connection with or form any part of it. The surrounding circumstances indicate plainly that the defendant never contemplated making an agreement for himself, distinct from the other subscribers. He subscribed the agreement to contribute, in common with others, to build the church, indicating specially the amount and character of his subscription; and this is all the effect properly to be given to the words prefixed to his signature.

It is said that the words import nothing more than an agreement to give a lease of the house in Genesee street to the society for three years, which is entirely at variance with the terms of the subscription providing for the payment of the amounts subscribed in six several installments. But it is not a fair construction of the language in which the subscription was made, to hold that the defendant intended thereby to constitute the society his tenant for three years, and that, by way of aiding to build the church, such society should control or occupy the premises. He obviously meant to give or appropriate the rent or income of the premises for three years, fixing such income at \$516; and not that the premises should be demised to the society for it to sub-let at such rent as could be obtained for the same.

The defendant, therefore, being a subscriber and party to the agreement to contribute towards building the church, the remaining inquiries are as to the amount and nature of his subscription, and whether a breach on his part was shown. The sum or amount annexed to his name, which he agreed to pay to the trustees according to the terms of the writing subscribed by him, was \$516. The writing attached to his signature is in

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effect this: "I will give the full rent or income of my house in Genesee street for three years, which at present rent is \$516." This was in substance a cash subscription to that amount, or at least to the amount of the full rent of the premises for three years. It was so intended by the defendant, or otherwise it would have been quite unnecessary to specify any sum as the rent or value of the premises. The intention of such specification was to fix the sum of the subscription of the defendant, or if not that, to show that the rent, and not a lease of the premises, was agreed to be contributed.

Now, was a breach of the agreement shown? The plaintiffs built the church by and according to the terms of the subscription, upon the faith of the amount so subscribed by the defendant and others, and performed the conditions imposed on them by the contract. In 1848, before the building was commenced, the defendant was called on for the first installment of his subscription. He declined to pay. In 1851 or 1852, the subscription was again demanded. He refused absolutely to pay or comply with his agreement, denying any liability. He never offered to execute a lease, or place the plaintiffs in a position to receive the rent of the house in Genesee street, but such rent was received by himself. Regarding the subscription of the defendant to be the rent of the house for three years, and not a fixed sum of \$516, as he collected and appropriated such rent, not towards building the church but to his own purposes, he is liable for the amount of it. After a denial of any liability, no further or more specific demand of the rent or subscription was necessary to put the defendant in default.

The mistake in the corporate name of the plaintiffs in the pleading, describing themselves as "The Trustees of the First Baptist Society," instead of "The First Baptist Society," was the subject of amendment in the court below, and is no such error as to lead to a reversal of the judgment in this court.

The judgment of the Supreme Court should be affirmed.

Constock, Ch. J., did not sit in the case; all the other judges concurring,

Judgment affirmed.

Bennett v. Judson.

BENNETT v. JUDSON.

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21 238 The vendor of land is responsible for material misrepresentations in respect
148 41 to its location and qualities made by his agent without express authority
21 238 and in the absence of any actual knowledge by either the agent or the
158 608 principal whether the representations were true or false.

One who, without knowledge of its truth or falsity, makes a material misrepresentation, is guilty of fraud as much as if he knew it to be untrue.

The fraud, it seems, is well stated in pleading as that of the principal, and if otherwise, and it appears at the trial to be that of an agent without any participation of his principal, the variance is the subject of amendment and will be disregarded upon appeal.

APPEAL from the Supreme Court. Complaint that the defendant, for the purpose of effecting a sale to the plaintiff of certain lands in the States of Indiana and Illinois, made false and fraudulent representations in respect to their location, proximity to a river and railroad, their agricultural qualities, &c.; that the plaintiff, confiding in such representations, bought the land, paid for it and incurred expenses in removing his family to the same and bringing them back after he discovered that the representations were false and the lands comparatively worthless. Upon the trial at the Steuben circuit before Mr. Justice JOHNSON, it appeared that the sale of the lands was negotiated by one Davis, an agent of the defendant; that neither the defendant nor Davis had any personal knowledge in respect to the lands, but that the representations made by the latter were but a repetition of statements made to him by a brother of the defendant who had formerly owned the lands, and who made such statements from information derived by him from persons residing in the States of Indiana and Illinois, and whom he had employed as agents for the payment of taxes. The statement was made in general terms, without referring to any other person as authority for its truth. The defendant had never been in the vicinity of the land sold by Davis in his behalf. The defendant's brother had, several years before, been upon lands

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which were pointed out to him as those which were conveyed to the plaintiff, and the land which he saw justified the description which he furnished to Davis, and which was repeated in substance to the plaintiff. That description was grossly inaccurate in particulars material to the value of the land, but the evidence tended to prove that the defendant, his brother and Davis were all, and alike, ignorant that such description was false. The defendant insisted that there was no evidence of fraud on his part, or that of his agent, to be submitted to the jury, and requested the judge to direct a verdict in his favor. The judge refused and the defendant excepted. The judge submitted it to the jury as a question of fact whether the defendant's agent or agents had practised a fraud in making a bargain with the plaintiff; and charged them that if such was the fact, the defendant having received the fruits of the bargain was liable to the plaintiff for the fraud, although he did not authorize such statement or know that it was made, or at the time know whether it was true or false. The defendant excepted. The plaintiff had a verdict and judgment, which having been affirmed at general term in the seventh district, the defendant appealed to this court.

Charles E. Soule, for the appellant.

Henry M. Hyde, for the respondent.

COMSTOCK, Ch. J. There is no evidence that the defendant authorized or knew of the alleged fraud committed by his agent Davis, in negotiating the exchange of lands. Nevertheless, he cannot enjoy the fruits of the bargain without adopting all the instrumentalities employed by the agent in bringing it to a consummation. If an agent defrauds the person with whom he is dealing, the principal, not having authorized or participated in the wrong, may no doubt rescind, when he discovers the fraud, on the terms of making complete restitution. But so long as he retains the benefits of the dealing he cannot claim immunity on the ground that the fraud was committed

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by his agent and not by himself. This is elementary doctrine and it disposes of one of the questions raised at the trial.

The complaint, in setting forth the cause of action, counts upon false representations made by the defendant, without any reference to the agent. This mode of stating the case we think was proper under any system of pleading. The same rule of law which imputes to the principal the fraud of the agent and makes him answerable for the consequences, justifies the allegation in pleading that the principal himself committed the wrong. If this were otherwise, the pleading was nevertheless amendable at the trial. The allegation might have been made to conform to the proof, and where this might properly be done at the trial, it can be done even after the judgment. This court in such cases never reverses a judgment, although the amendment has not been actually made. (*Lounsbury v. Purdy*, 18 N. Y., 515.)

The question of fact litigated at the trial was, whether the representations of Davis, the agent of the defendant, concerning the western lands, were fraudulently made. The defendant claimed a nonsuit; one of the grounds of his motion being that the evidence wholly failed to show that either the agent or the principal knew that the representations were false. According to the testimony on the part of the plaintiff, certain statements were made by Davis, of a very direct and positive character, concerning the quality and advantages of the defendant's land situated in Indiana and Illinois. These statements were so minutely descriptive of the land that on their face they clearly imported a knowledge of the facts on the part of the person making them, and they were not materially qualified by a reference to any other person as the source of information. The evidence on the part of the defendant gave a somewhat different complexion to the case, but the question of fact was fairly submitted to the jury. The question of law was whether the representations could be deemed fraudulent unless they were known to be false. In regard to this we entertain no serious doubt. Mr. Justice STORY thus states the rule: "Whether a party misrepresenting a material fact know it to be false, or

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make the assertion without knowing whether it were true or false, is wholly immaterial; for the affirmation of what one does not know or believe to be true is equally, in morals and law, as unjustifiable as the affirmation of what is known to be positively false." (1 Story Eq., § 198, and see note.) In the case before us the representations of the defendant's agent were proved to be grossly false, and they could not be honestly made when he had not the slightest knowledge of the subject to which they related. The plaintiff knew nothing of the lands which he was about to buy. If these statements as to the situation and characteristics of those lands were made with an intent that he should rely upon them, and if he did rely upon them, it was as much a fraud as if they were known to be untrue. The law is not so unreasonable as to deny redress in such a case. (*Stone v. Denney*, 4 Metc, 161; *Buford v. Caldwell*, 3 Missouri, 477; *Thomas v. McCann*, 4 B. Monroe, 601; *Parham v. Randolph*, 4 Howard [Miss.], 485.)

The case does not present any other questions requiring a particular consideration. We think the judgment must be affirmed.

SELDEN, J., expressed no opinion; all the other judges concurring,

Judgment affirmed.

HAIGHT v. PRICE.

The plaintiff of whose title there was no evidence except possession for six years, during that time acquiesced, and his predecessors in the possession had for ten years previously acquiesced, in the diversion of a water-course by the occupant of land higher up the stream. In an action for damages from such diversion: *Held*,

That no acquiescence short of twenty years repels the presumption that the diversion of a water-course was in hostility to the rights of the riparian proprietors, or authorizes the presumption either of grant or of license:

21	241
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21	241
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The plaintiff is not put to any proof of the circumstances under which the diversion began, or who was the owner of the premises affected, but may rest on the principle that a diversion is to be deemed wrongful in the absence of proof establishing the right affirmatively.

That the premises injured by the diversion, and those on which it was made, were then held by the same owner, and the plaintiff came into possession under his title, in subordination to his right to continue the diversion, or as an intruder, are facts, the burden of proving which is on the defendant, and which cannot be presumed in his favor.

A part of the injury resulting to the plaintiff from the destruction of an aqueduct erected by the defendant to lessen the effect of the diversion; it is no defence that such destruction was caused in part by a dam built by the plaintiff on his own land, which would have produced no injury at the place of the defendant's aqueduct, if the channel had there remained in its natural condition.

APPEAL from the Supreme Court. Action for diverting the water of a stream called Trout run, in Arcadia, Wayne county, by means of a mill dam, whereby the plaintiff, as he alleged, was deprived of the use of the water for the supply of his brick-yard situated on his land at a point lower down the stream. The defendant erected a grist mill on the stream in the year 1836. To obtain the necessary water power he built a dam across the stream, discharging the water, after it had passed through his works, by the tail-race, at a lower level than the bottom of the original channel, and conducting it, by means of an artificial ditch running across the natural channel, in such a direction as to divert it from the plaintiff's premises on which the brick-yard was situated. If the diversion had been entire, the channel where it passed through the plaintiff's premises would have been dry; but at the place where the ditch crossed the former channel, four or five feet below its bottom, the plaintiff constructed an aqueduct which continued the former waterway, so that the surplus water which wasted from the dam and continued to run in the old channel, and that which was brought down by floods, would still flow past the point where the ditch crossed the channel, and would be available to the plaintiff for the use of his brick-yard lower down; and it was sufficient for his purpose, except in the dry portions of each summer, for about three years before the trial, when the plaintiff's supply

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of water was deficient. On these occasions the plaintiff was accustomed to apply to the defendant's miller to let more water run down the old channel, which request was sometimes complied with and sometimes refused. In March, 1852, which was sometime before the commencement of the action, the banks of the stream at each end of the aqueduct were washed away, and the stream passed entirely into the ditch, and all the water was conducted away from the plaintiff's premises. The plaintiff, at some expense, afterwards procured water by means of pumps which were used to raise it from the ditch into the old channel in which it came down to the brick-yard. The plaintiff's claim was to recover for the diminished supply prior to this occurrence, and for the entire lack of water afterwards, and the expense of the pumps.

It appeared that the brick-yard was formed in 1832 or 1833, and had been used for the manufacturing of bricks since that time; and that the plaintiff went into possession of it five or six years before the trial. The nature of his title, and his connection, if any, with the former possessor, was not shown. The stream passed on to and run upon the land which was in possession of the plaintiff at a convenient distance from the brick-yard, and the latter had been supplied with water from the channel. In order to accumulate and retain the water for convenient use opposite the brick-yard, the plaintiff had excavated a sort of basin in his channel, and had thrown a slight dam across it a short distance below, and upon the top of the dam had built a fence. The defendant gave evidence tending to show that the carrying off the aqueduct, in the spring of 1852, was caused by the operation of the plaintiff's dam in hindering the natural flow of the water, and setting it back upon the aqueduct and the adjacent banks, by means of which, as it was claimed, they gave way, and the water was thereby turned into the ditch. This was answered by evidence on the part of the plaintiff tending to show that his dam had been carried away by high water the preceding autumn, and consequently was not existing when the aqueduct went off; and also to show that the timber of the aqueduct had become impaired by age,

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and that its destruction arose from that cause, and also from the fault of the defendant in permitting rubbish from above to float down against it. It appeared that the defendant had remonstrated against the continuance of the dam as likely to injure the defendant and carry off the aqueduct, and that the plaintiff had sometimes taken his dam down on occasions of high water. After the aqueduct was carried away, the defendant at first promised the plaintiff to repair it; but upon being afterwards applied to by the plaintiff, he declined to do it.

The judge charged the jury, in effect, that the plaintiff had a right to the use of the waters of the stream in their natural channel upon the premises occupied by him as a brick-yard, and was entitled to recover any damages he had sustained by being deprived of them by any act of the defendant in diverting the stream, by means of the ditch mentioned in the evidence; and that there was no proof in the case upon which to raise the presumption of a grant or license to the defendant to divert the water in the manner he had done, nor that the plaintiff entered into the possession of the brick-yard premises in subordination to a right in the defendant to use the water in the manner mentioned. He also charged them that if the plaintiff's dam caused or contributed to the carrying away of the aqueduct, that circumstance constituted no defence unless it also appeared that his dam was maintained at so high an elevation that if the stream had remained in its natural state some injury would have been occasioned to the banks on account thereof. The defendant's counsel excepted to the several propositions of the charge. The jury gave a verdict for the plaintiff for \$200. After an affirmance of the judgment at the general term, the defendant appealed here.

Henry R. Selden, for the appellant.

William Clark, for the respondent.

DENIO, J. The plaintiff's possession of the land on which his brick-yard was situated, and through which the water-course

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ran, was *prima facie* evidence of ownership in him. As such owner he was presumptively entitled to have the stream run in its natural channel, without obstruction or diversion. It is true that when he went into possession he found that the water had been diverted by the defendant's dam above; and it is to be inferred that such diversion had been acquiesced in by the parties who had preceded him in the possession, and such acquiescence was continued on his part until the commencement of this action. But the whole period, during which the several successive proprietors forbore to assert their right to have the water returned to its natural channel, was not sufficient to raise the presumption of a title so to divert it. But the plaintiff did not show any privity between himself and the former possessors, or explain how it happened that the defendant was permitted to make the diversion, at the time it was first effected, some twelve or thirteen years before the plaintiff went into possession; and hence it is averred by the defendant's counsel that the jury might have presumed, if the question had been submitted to them, that the defendant was himself at that time the owner of the premises now possessed by the plaintiff, in which case he would have had a right to divert the water as there would have been no one entitled to object; and if the plaintiff subsequently took title under him, he would have held in subordination to the defendant's right to continue the diversion. It is urged that this presumption should attach in the absence of any proof to the contrary, because the plaintiff holds the affirmative in this action, and because, moreover, everything must be deemed to have been rightfully and lawfully done unless the contrary be shown. This reasoning is not satisfactory to my mind. Assuming that the defendant's ownership of both parcels at the time he diverted the stream from the lower one, would have concluded his subsequent grantees of that parcel, the suggested unity of ownership was a fact which the defendant was bound to prove on his own part. The diversion was *prima facie* a wrong, and though in its nature it was capable of excuse or justification, by proof of the existence of other facts which would render it lawful, the burden of showing the

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existence of such facts was upon the defendant. It is as easy to suppose that the person who owned the brick kiln lot when the defendant's mill was built, granted to the defendant the right to divert the water, as to conjecture that the diversion was a lawful act, on account of the ownership at that time of both parcels in the defendant; and yet it is clear that a jury would not be authorized to find a grant upon the evidence in this case. No doubt there is an inference of some weight arising out of an acquiescence in such an act for a considerable length of time, short of the period of prescription, that a justification of some sort existed; but the law, upon motives of policy, and to avoid uncertainty and the hazard of contradictory determination, has fixed upon the period of twenty years as the shortest time for admitting the presumption of a grant. Where a diversion has not continued for that period, it is considered hostile to the rights of the parties entitled to have the stream run in its natural channel. Stress is laid upon the circumstance that the plaintiff has not connected himself with the title of the party in possession when the diversion took place; and we are, in effect, asked to intend from this that the then owner was a stranger to the plaintiff's title, but that he in some legal manner consented to the act of the defendant. But as the plaintiff's possession entitled him to be considered the owner, the legal intendment is that he derived his title from some former owner. If he was an intruder upon the lands of another person, and that other, or his predecessor in the title, had granted the right to divert the water to the defendant, these being affirmative positions, it was for the defendant to prove their existence on his own part.

The circumstance, that the plaintiff and his predecessors in the possession had received the diminished supply of water for nearly twenty years, did not legally tend to show a license; for if the deprivation had been total it would not have had that effect. The same may be said of the evidence that the plaintiff took down his dam in time of high water. He had no right to keep up such an obstruction at such a time if it tended to overflow the lands of the proprietors on the stream above.

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Upon the whole this seems to me the common case of an unlawful diversion of water for a period a little short of that which would enable the jury to presume a consent, and that it would have been erroneous to submit it to the jury to find either a grant or license.

The other branch of the charge was also correct. The aqueduct was an artificial structure erected by the defendant to enable him to divert the principal part of the water of the stream, and yet to conduct the remainder down the natural bed of the stream. The plaintiff had a right to have the whole stream pass that point of its course in its natural bed, and he did no wrong to any one in erecting a dam on his own land below, provided it was such a one as would not have caused any injury to the defendant provided he had not interfered with the natural channel. This was the aspect in which the judge submitted the case.

The judgment must be affirmed.

SELDEN and DAVIES, Js., expressed no opinion; all the other judges concurring,

Judgment affirmed.

FOSTER v. BEALS.

The written receipt of a mortgagee, the date of which was not proved otherwise than by the writing itself, is not evidence against the assignee of the mortgage subsequent to such date, of a payment by the mortgagor.

The failure to produce the mortgage at the time of receiving a payment, with the suggestion of a false reason to excuse it and the insolvency of the mortgagee, held insufficient, as matter of law, to put the mortgagor upon inquiry and charge him with notice that the mortgage had been assigned.

APPEAL from the Supreme Court. Action to stay the foreclosure of a mortgage by advertisement and to compel the

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165	25

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holder to receive a sum which had been tendered him by the plaintiff in full and to discharge it. The trial was before a referee, who found as facts that the plaintiff Foster executed the mortgage to one Boyce on the 23d May, 1851. It was conditioned for the payment of \$2,983 with interest on or before April 1, 1854. On the 4th day of June, 1851, the mortgage was duly assigned by Boyce to the defendant Beals. On the 6th June, 1851, the plaintiff, in good faith and without notice of the assignment, paid \$850, to apply on the mortgage, to one Austin the son-in-law, partner in business and agent of Boyce, at Boyce's dwelling-house where Austin also lived, and in the absence of Boyce. Boyce was then reported to be in failing circumstances. He and Foster lived within a few miles of each other. When Foster made the payment he inquired for Boyce, and on learning his absence told Austin that he wanted to make a payment upon his bond and mortgage, and asked if the papers were there. Austin looked for them without success in the natural depositories, when Foster suggested that they must be at the county clerk's office for the purpose of being recorded. Austin said they probably were, and Foster then made the payment. On the 30th June, 1851, Foster made another payment of \$150 to Austin for Boyce, when substantially the same conversation was repeated. This payment was also found to have been made in good faith, and without knowledge of the assignment of the mortgage to Beals. The referee allowed both these payments. He also allowed another payment of \$294, the only evidence of which (received by him under exception by the defendant) was a receipt proved to be wholly in the handwriting of Boyce, and bearing date May 31, 1851. There was no evidence of the actual time of its execution except the date on the paper.

The defendant's counsel insisted that the facts above stated were sufficient to put Foster upon inquiry as to the possession and ownership of the bond and mortgage, and, unexplained, to render him chargeable with knowledge or notice of the assignment, and in equity still liable upon his bond and mortgage notwithstanding such payments; but the referee decided as a

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conclusion of law, that these facts were not sufficient to put him upon inquiry or charge him with constructive notice of the assignment. He ordered judgment accordingly, which having been affirmed at general term in the seventh district the defendant appealed to this court. The case was submitted on printed arguments.

Smith & Lapham, for the appellant.

Henry O. Chesebro, for the respondent.

DAVIES, J. After considering the circumstances under which the plaintiff made the payments to Boyce, and arriving at the conclusion that as matter of law—in the face of the referee's direct finding that as matter of fact they were made in good faith, and without notice—they could not be held sufficient to have put the plaintiff upon inquiry, the learned judge proceeded: We think, however, the referee erred in admitting the receipt of Boyce of May 31, 1851, as evidence of the payment to him, on that day, of the sum of \$234, on the bond and mortgage. A written receipt for money is but the admission of the party giving it, and is always capable of explanation. It is the declaration of the party attested by his signature. It has no greater significance from the circumstance that it is reduced to writing and signed by him. If made by parol, it would be of equal value. It has been supposed, since the decision of *Paige v. Cagwin*, (7 Hill, 361), in the Court of Errors, that the rule was settled in this State, that the declarations or admissions of the assignor of a chose in action could not be given in evidence against an assignee for value. This case was reviewed by PARKER, J., in *Smith v. Webb* (1 Barb. S. C. Rep., 230), where he says it was held in that case, that the declarations of a prior holder of a note, transferred after maturity, or of a vendor of a chattel, are not admissible in evidence against a subsequent purchaser who acquired title for a valuable consideration; and that such declarations are only admissible when made by a party really in interest, or by one through

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whom the plaintiff claimed by representation. The rule is only applicable where there is an identity of interest between the assignor and assignee. This identity of interest is said in *Fitch v. Chapman* (10 Conn. Rep., 8), to exist "when the nominal party was suing in fact for the benefit of a third person." This court in *Booth v. Swezey* (4 Seld., 276), approves of the cases of *Paige v. Cagwin* and *Smith v. Webb*. In that case it was held that in an action, brought by the assignee of a mortgage to foreclose the same, the declarations of the mortgagee made by him prior to the assignment, were inadmissible to impeach the mortgage, and to show that it was given upon a usurious consideration. It is true, that Judge MORSE, in his opinion, says that a receipt given by the mortgagee stands upon a different footing, as an act of the parties. The ground of this distinction is not perceived. The making of a usurious agreement which, if proved, would invalidate the whole mortgage, is as much the act of the parties as the payment of a part of the moneys secured thereby, and the giving of an acknowledgment by the party receiving it, that it had been paid. Suppose in *Booth v. Swezey*, the mortgagor had offered the written history of the inception of the mortgage signed by the mortgagee, and which would have shown its usurious character, would the offer have been in any the less objectionable form? We do not see that it would, and the same reasons which would require its exclusion in one form, are equally applicable to its exclusion in the other. The great objection to this class of testimony is, that it seeks to establish by hearsay or secondary evidence what can be shown by better and more satisfactory proof. The case of *Jermain v. Denniston*, in 2 Selden, 276, is relied upon as holding a contrary doctrine. That case was decided the year before *Booth v. Swezey*, and some of the judges who sat in that case, and who concurred in the decision of it, took part in the decision of the former case. In *Jermain v. Denniston*, it was said that admitting the doctrine of *Paige v. Cagwin* to the fullest extent, it could not apply when the previous holder of a note, while he owned it, put into the hands of the maker, in the usual course of busi-

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ness, written evidence of its payment and discharge. That is not the present case, and does not therefore control it.

The judgment in this cause must be reversed, and a new trial ordered, with costs to abide the event of the action.

CLERKE, J., delivered an opinion to the same effect; SELDEN, WRIGHT, and WELLES, Js., concurred.

COMSTOCK, Ch. J. (Dissenting.) The payment made before the assignment, was *prima facie* proved by the receipt of the mortgagee. (1.) The holder of the receipt is entitled to the benefit of the presumption usually allowed in respect to written instruments, that it was given at the time it bears date. (2.) That fact being presumed, the receipt ought not to fall within the rule that the mere declaration of a former holder of a chose in action is not admissible in evidence in a controversy between the debtor and an assignee. A receipt in full has a legal operation (at least *prima facie*) as a discharge of the debt; and a receipt of a partial payment should operate as a partial discharge. Such an instrument presumptively shows an actual transaction in which both the parties were actors, and it stands on higher ground than a mere declaration which may be made to any one when the party in whose favor it is made is not even present. It is scarcely expedient to extend the rule which excludes declarations of that nature. It seems to me a rule of great convenience that written acknowledgments of this kind given by a creditor to his debtor should be taken as true in the debtor's favor, until they are disproved or some suspicion is thrown upon them. The doctrine, if not fully sustained, is certainly very strongly countenanced in some of the adjudged cases in this State. (See *Sherman v. Crosby*, 11 Johns, 70; *Rawson v. Adams*, 17 Johns, 130; *Booth v. Swezey*, 4 Seld., 276; *Jermain v. Denniston*, 2 Id., 276.)

I think the referee was also right in allowing the two payments made to the mortgagee after the assignment. In order to perfect an assignment of a chose in action and protect the assignee against future payments to the assignor, notice should

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be given to the debtor. If the assignee neglects to give such notice himself, he must, in order to avoid the effect of payment to the assignor, show that the debtor, before making it, in some other way acquired a knowledge of the fact. (*Reed v. Marble*, 10 Paige, 418; 1 R. S., 763, § 41; *Adams Equity*, 53-54.) Notice may be inferred, of course, from the circumstances attending the transaction; but the true question is always one of good faith. The referee in this case has found that the payments were made without notice of the assignment and in good faith. The particular facts stated in the finding certainly do not overthrow that conclusion; in other words, those facts do not compel us as a legal inference to impute notice and bad faith. It is true the securities were not present when the payments were made, nor was the supposed creditor personally there. The payments were made to an agent. The plaintiff inquired of him for the papers. They were searched for and not found. The plaintiff suggested that they might be at the clerk's office for record, and the agent stated that such was probably the fact. The fact suggested was by no means improbable as to the mortgage at least, because it had been only recently given, and might well be at the clerk's office for record. It is difficult to believe that these payments were made in bad faith, and we certainly cannot say so in opposition to the conclusion of fact found at the trial. The case of *Brown v. Blydenburgh* (8 Seld., 141), is cited for the appellant, but the circumstances of that case distinguish it from the present. The conveyance there was made to the creditor in full satisfaction of the mortgage debt, and of course the securities ought to have been delivered up at the same time. The transaction was with the mortgagee personally, and no inquiry was made of him for the securities, nor did he make any representation or suggestion intended or calculated to mislead. Such being the facts, this court affirmed the decision of the court below, where the question had been determined against the mortgagor. The question was one of fact, as it is in the present case. The decision is clearly not an authority requiring us to hold as matter of

Clement v. Cash.

law that the plaintiff was chargeable with notice when he made the payments in question.

The judgment should be affirmed.

DENIO and BACON, Js., concurred in this opinion.

Judgment reversed and a new trial ordered.

CLEMENT v. CASH.

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21	253
161	52

The sum named in a contract as liquidated damages for its non-performance will not be construed as a penalty, although it appears too large for a breach of some of the conditions and too small for others, where all the conditions are to be simultaneously performed, *e. g.*, where the agreement is to convey land, pay money and assign securities for money at the same time, and as the consideration of a conveyance then to be executed by the other party.

A covenant to assign a bond and mortgage is satisfied without a delivery of the original mortgage, the same having been lost after being recorded.

A covenant to assign an existing mortgage described as having been executed by R. and S. and their wives, held satisfied by the assignment of such mortgage though not executed by the wives of R. and S., it having been given to secure the purchase money of the mortgaged premises.

Lampman v. Cochran (16 N. Y., 275), considered and distinguished.

APPEAL from the Supreme Court. Action to recover \$2,000 as liquidated damages for the non-performance by the defendant of a contract to convey certain land to the plaintiff. The defence was that the plaintiff had failed to assign certain mortgages, the assignment whereof was a condition precedent to a conveyance by the defendant. The grounds on which it was insisted that the assignments of such mortgages, tendered by the plaintiff, were not in compliance with the contract are sufficiently stated in the following opinion. The defendant also insisted that the sum of \$2,000 mentioned in the contract was to be construed as a penalty and not as liquidated damages. The contract required the plaintiff to pay \$4,000 on the first day of April, 1855: to assign two mortgages, one for \$3,737,

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the other for \$1,000: to convey to the defendant a house and lot, and to deliver to him two promissory notes to be made by the plaintiff with a good indorser for \$500; all of which acts were to be performed on the first of April, 1855, on which day the defendant was to execute a conveyance to the plaintiff of the land specified.

The judge at circuit decided against the defendant upon both points, and directed a verdict for the plaintiff for \$2,000 and interest, subject to the opinion of the court at general term. Judgment being there rendered for the plaintiff, the defendant appealed to this court. The case was submitted upon printed arguments.

L. N. Bangs, for the appellant.

Bissell and Ballard, for the respondent.

WRIGHT, J. The questions in the case are, 1st. Was there a sufficient offer to perform on the part of the plaintiff, at the time and place designated in the contract; and 2d. Were the damages for non-performance liquidated and fixed by the contract.

1. The execution and delivery of the deed of the defendant's land and the payment therefor by the plaintiff, were to be simultaneous acts. Such payment was to be made in cash, cash securities and real estate. On the day appointed for the performance of the contract, the plaintiff tendered \$4,000 in cash: the assignments of the bonds and mortgages mentioned in the contract: two indorsed promissory notes of \$500 each; and a deed of a house and lot in Byron. The contract provided that the defendant should take, in part payment for his land, an assignment of a mortgage upon land known as the Stewart farm, executed in May, 1854, by Joel Rouse and Lewis Merwin and wives, for the sum of \$3,137 and interest; and, also, an assignment of a mortgage on land in the town of Pembroke, executed on 5th July, 1854, by Charles L. Branch to Clement for \$1,000 and interest. The original mortgage of Branch was not attached to the assignment; for the reason that it had been left for record in the clerk's office of the county,

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and could not afterwards be found. The mortgage was however recorded, and the assignment tendered referred in terms to the record. The other assignment tendered was of a bond and mortgage alike in all respects to that referred to in the contract, except that the mortgage was not signed by the wives of Rouse and Merwin. It is not insisted that there was any failure in the offer to perform on the part of the plaintiff, unless in respect to these assignments. Nor do I think there was any here. He offered substantially to do and perform all that the contract required of him, and sufficient to put the defendant in default.

With respect to the Branch mortgage, all that the plaintiff covenanted to do was to transfer it by assignment to the defendant. He tendered a proper assignment, with the bond attached. The original mortgage, it is true, was not present with the assignment, it having been sent to the clerk's office to be recorded, and was lost. It was recorded on the 21st September, 1854. An assignment of the bond and mortgage, the bond being attached and the mortgage recorded, was as effectual for all purposes as if accompanied with the mortgage.

The mortgage assigned on the Stewart farm was undoubtedly the one referred to and described in the contract, though not purporting to be signed by the wives of Rouse and Merwin. On the day of the tender the defendant made no objection to this assignment; showing that he considered the tender, so far as this mortgage is in question, a compliance with the intention of the contract. It was a purchase money mortgage, and so expressed in the instrument. It was upon the identical farm mentioned in the contract, of the same date, and executed to secure the exact sum (\$3,137) therein named. If the parties to this action were reversed, and the same facts proved, there could be no recovery against the plaintiff, on the ground that there was a breach of the contract in failing to assign a mortgage on the Stewart farm, executed not only by Rouse and Merwin, but by their respective wives. The offer to perform in this respect was according to the intent of the contract.

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Upon the whole, therefore, there was nothing in the conduct or acts of the plaintiff to justify or excuse the refusal of the defendant to perform his part of the contract to grant and convey, by a good and sufficient deed, the premises and real estate described therein. The pretext set up in the answer, that the defendant was induced to execute the contract upon the fraudulent representations of the plaintiff in respect to the validity and nature of the liens of the mortgages agreed to be assigned and taken in payment, was entirely unproved. In short, the evidence showed a total failure to perform on his part, without any legal excuse or justification.

2. The important, and, in fact, the only question of any real difficulty in the case, arises in respect to the damages. The concluding clause of the agreement is as follows: "In case either of the said parties shall fail to keep, perform and fulfill the covenants and agreements herein contained, on his part to be kept, performed and fulfilled, the party so failing to perform shall pay to the other party the sum of two thousand dollars, which said sum is hereby mutually agreed by and between said parties to be the ascertained and liquidated damages for such non-performance." It is competent for the parties to a contract for the purchase or sale of real estate, to liquidate and settle by agreement between themselves, the amount of damages to be paid upon a breach of the contract, instead of leaving such amount to be ascertained by a court or jury. When, says RUGGLES, J., in *Cotheal v. Talmage* (5 Seld., 551), the damages resulting from the breach are uncertain in amount, as they are in all cases other than where the contract is to pay money, the parties have the right to say how much shall be paid by way of compensation to the party injured; and when they have settled that compensation, neither a court of law nor a court of equity will diminish its amount unless it be so grossly disproportionate to the actual injury that a man would start at the bare mention of it. (2 Bos. & Pul., 351.) So, also, I think where the language employed in that part of the instrument ascertaining the amount of the damages is clear and plainly indicative of an intention to fix a definite sum to be

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paid by the party failing to perform, and negatives all inference of an intent to name the sum as a penalty, the courts are not authorized, by construction, to make a new contract for the parties, or unmake the one made by them, and hold, from the nature and circumstances of the case, that the parties intended something wholly different from what they have expressed. When the parties to a contract, in which the damages to be ascertained, growing out of a breach, are uncertain in amount, mutually agree that a certain sum shall be the damages in case of a failure to perform, and in language plainly expressive of such agreement, I know of no sound principle or rule applicable to the construction of contracts, that will enable a court of law to say that they intended something else. Where the sum fixed is greatly disproportionate to the presumed actual damage, probably a court of equity may relieve; but a court of law has no right to erroneously construe the intention of parties, when clearly expressed, in the endeavor to make better contracts for them than they have made for themselves. In these, as in all other cases, the courts are bound to ascertain and carry into effect the true intent of the parties. I am not disposed to deny that a cause may arise in which it is doubtful from the language employed in the instrument, whether the parties meant to agree upon the measure of compensation to the injured party in case of a breach. In such cases there would be room for construction; but certainly none where the meaning of the parties was evident and unmistakable. When they declare, in distinct and unequivocal terms, that they have settled and ascertained the damages to be \$500, or any other sum to be paid by either failing to perform, it seems absurd for a court to tell them that it has looked into the contract and reached the conclusion that no such thing was intended; but that the intention was to name the sum as a penalty to cover any damages that might be proved to have been sustained by a breach of the agreement. Still, certain rules have crept into the law that are supposed to control the construction of contracts of this character, until in the view of some it has become difficult, if not impossible, to support an agreement for liquidated damages

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in cases where the amount ascertained by the parties seems disproportionate to the conjectured actual damage.

The present was a contract for the sale and transfer of real estate, where the damages resulting from a breach would be uncertain in their amount; and it is not to be supposed that the parties were not at least as well able to estimate the value of the bargain, and appreciate the consequences of failing to obtain the land on the one hand or the stipulated consideration on the other, as either judges or juries. The damages for non-performance were liquidated and fixed, if the language used by the parties to a contract can, in any case, fix the amount. It is precise and explicit, leaving nothing for construction or intendment. The parties declare, in language not capable of being misunderstood or misinterpreted, that they have ascertained and liquidated the damages at two thousand dollars, to be paid by the party failing to perform the agreement to the injured party. If they could do this, that is the sum to be treated as the measure of damages. That they could do it as respected a contract like the present, is clear from numerous adjudications and upon principle. (*Hasbrouck v. Tappen*, 15 John. R., 200; *Knapp v. Maliby*, 13 Wend., 587; *Holmes v. Holmes*, 12 Barb., 137; *Esmond v. Van Benschoten*, 12 Id., 366; *Mundy v. Culver*, 18 Barb., 336.) In *Kemble v. Farren* (6 Bing., 141) a case often cited on the question whether the sum named is to be treated as liquidated damages or as a penalty, Chief Justice TINDALL said, that if the clause fixing the sum for liquidated damages "had been limited to breaches which were of an uncertain nature and amount, we should have thought it would have the effect of ascertaining the damages upon any such breach;" for, he observed, we see nothing illegal or unreasonable in the parties, by their mutual agreement, settling the amount of damages uncertain in their nature at any sum upon which they may agree." Damages resulting from the breach of any contract, except for the payment of money, when the law liquidates and fixes them, are uncertain in their nature and amount; and whether they may be accurately ascertained with greater or less difficulty by the

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testimony of witnesses to the point, cannot change this character of uncertainty, or prevent the application of the rule that in such a case, the parties having liquidated the damages at a definite sum, they will be regarded as having so intended, and the sum fixed be treated as the measure of compensation.

I am aware that there are English and American cases holding the doctrine that when the contract binds the parties to do several things of different degrees of importance, and the sum stated is made payable for the non-performance of any or either, it is a penalty; though it may be different in cases where a sum is fixed as damages for the non-performance of a single specified act. The learned judge in *Cotheal v. Talmage* (5 Seld., 551), has shown that these cases have no solid foundation in principle, and that the doctrine enunciated has no countenance in the cases of *Astley v. Weldon* (2 Bos. & Pul., 346), and *Kemble v. Farren* (6 Bing., 141), from which it is supposed to be derived. There are also cases qualifying the above rule in this respect, that when the sum which is to be a security for the performance of an agreement to do several acts will, in cases of breaches of the agreement, be in some instances too large and in others too small a compensation for the injury thereby occasioned, that sum is to be considered a penalty. (*Davies v. Penten*, 6 Bar. & Cr., 216.) This qualification of the rule has no foundation in principle or authority, unless among the things agreed to be done is to pay a sum of money, and the agreement is to pay a larger sum as liquidated damages in case of a failure to perform any or either of the stipulations. In such case the law fixes and liquidates the smaller sum, and as Chief Justice TINDALL remarked in *Kemble v. Farren*, "that a very large sum should become immediately payable in consequence of the non-payment of a very small sum, and that the former should not be considered the penalty, appears to be a contradiction in terms." When the contract is to pay money, if a larger sum be stipulated as damages for the non-payment of a smaller one, the parties will be presumed to have intended the former as a penalty; and when one of the distinct covenants in a contract is to pay a smaller sum of

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money than that stipulated as damages for non-performance by the parties, and there are distinct covenants to do or perform other distinct acts, the damages resulting from a breach of which are uncertain in amount, if the larger sum named as liquidated damages be expressed to cover any and all the breaches, it being a penalty in regard to one of the stipulations to be performed, is to be treated as a penalty as to all. This is as far as the cases of *Astley v. Weldon* and *Kemble v. Farren* go; and as far as courts can go, by any reasonable rule of construction, in reaching the intention of the parties to a contract wherever is inserted a clause liquidating the damages. If it were conceded, however, that the doctrine of the cases referred to is to be considered as the established law of this State, it cannot be applied to the present cases. The contract in question, in legal effect, provided but for the performance of a single act on each side, and at the same period of time, viz.: the execution and delivery of a deed of the land by the defendant, and payment therefor by the plaintiff. That the defendant agreed to receive in payment for his deed, and the plaintiff to pay, simultaneously with its delivery, the consideration in money and other property, cannot divest what was to be done of the character of a single transaction. If the defendant failed to convey, or the plaintiff to make payment in the way covenanted, there was a total non-performance. The consideration to be paid for the deed was over nine thousand dollars, four thousand of which was to be in cash, and over five thousand in money securities; the cash and transfers of the securities to be passed over to the defendant on the receipt of the deed. It is not at all like the case of *Lampman v. Cochran* (16 N. Y., 275), where the contract provided, among other things, that one of the parties should give to the other, on a specified day, a promissory note for \$200, and on a subsequent day a bond and mortgage for \$2,000, with interest, and the parties agreed therein "to pay one to the other the sum of \$500 as liquidated damages," on failure to perform the contract. The case but re-affirmed the doctrine in *Astley v. Weldon*, that where a larger sum is stipulated as damages for the non-payment of a smaller

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one, the larger sum will be held to be a penalty. In the present case the consideration agreed to be paid on receiving a deed of the defendant's farm was over \$9,000, while the sum agreed upon as damages to be paid by the party failing to perform the agreement was \$2,000.

The defendant having broken his contract, I think the proper damages to be awarded for the breach are those liquidated and fixed by agreement of the parties. If a court of law were justified in any case in interfering on the ground that the sum named was grossly disproportionate to the actual injury, such disproportion is not apparent in this case.

The judgment of the Supreme Court should be affirmed.

SELDEN and CLERKE, Js., expressed no opinion; all the other judges concurring,

Judgment affirmed.

BOUGHTON v. OTIS *et al.*

The default of a manufacturing corporation, organized under the general act (ch. 40 of 1848), to publish in the first twenty days of January, the statement required by section 12 of that act, imposes a personal liability upon the trustees in office for all corporate debts existing while they are in default, but not, it seems, for debts contracted after their retirement from office.

A trustee coming into office after a default, is personally liable for such debts only as are contracted while he is in office, and before a report is made and published.

Whether a trustee not in office during the first twenty-one days of the January next before or after the contracting of the debt is in any case liable, *Quære*.

APPEAL from the Supreme Court. Action against the trustees of the Rochester Novelty Works, a manufacturing corporation organized under the general act (ch. 40 of 1848). The complaint showed that Boody, Ritter and Huntington, were trustees of the corporation from January 1, 1857, to some time in March. From and after that time Boody, Otis and

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120	606
21	261
164	232
21	261
165	7

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Palmer became and continued trustees until December following. The trustees did not, within twenty days after the 1st of January, 1857, or at any time since, file and publish the statement or report required by the 12th section of the act. The corporation was indebted to the plaintiff for goods sold to it at divers times between January 18, 1856, and January 1, 1857, and on the 8th of April, 1857, executed its promissory note for the amount of such indebtedness, for which, with interest, the plaintiff demanded judgment. He also demanded the amount of another note made by the corporation in July, 1857, for goods sold to it between January 8th and May 5th, 1857. This action was commenced in December, 1857. The defendant Otis demurred, and having had final judgment in his favor at general term in the seventh district, the plaintiff appealed to this court. The cause was submitted on printed arguments.

Harvey Humphrey, for the appellant.

William F. Cogswell, for the respondent.

COMSTOCK, Ch. J. The general act under which "The Rochester Novelty Works" was incorporated, declares that the companies organized according to its provisions, shall, annually, within twenty days from the 1st day of January, make a report stating the amount of the capital stock, the proportion actually paid in, and the amount of existing debts; and that if any company shall fail to do so, "all the trustees of the company shall be jointly and severally liable for all the debts of the company then existing, and for all that shall be contracted before such report shall be made." (Laws of 1848, p. 57, § 12.) There is certainly some obscurity in this language, when we come to apply it to different conditions of fact. "All the trustees" are declared to be liable for "all debts." The most literal interpretation will undoubtedly give to the provision a broader significance than the legislature intended. For example, a board of trustees might be superseded by a new election immediately after a default, in making the report, had occurred. Of course

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the retiring trustees would be liable for the debts then existing. They ought to be so liable, because it would be simply attaching to their own default the consequences which the statute has declared. But in a literal use of the language, they would also be liable for all future debts of the company, if their successors should also fail to make the report, although they had ceased to be trustees or even stockholders. Thus, notwithstanding the loss of all control in the management of the company and even of all interest in its affairs, they might remain liable forever in consequence of the continuing default of those who succeeded them, a default which they would have no power to prevent, any more than they would to prevent the contracting of future debts. This clearly was not the intention of the legislature.

Equally opposed, in my judgment, to the equity and good sense of the statute, is a construction which imposes upon a succeeding board of trustees a liability for debts which have become charged upon their predecessors by reason of the default of the latter. According to this construction one body of trustees may retire from office charged with all the debts of the company, because they had not complied with the law, while those who are appointed to succeed in the management cannot assume the trust, without taking also the personal burdens which the former trustees had incurred by their own neglect. This will appear the more unreasonable when we consider, that the trustees thus coming into office after a default of those who preceded them, had no power to prevent that default, and that they have none to avert its consequences. They could not prevent it, because they were not in the management when it occurred. They cannot avert its consequences, if this be the true construction of the law, because although they may, with the utmost promptitude, file a report as the statute requires, that proceeding on their part will not discharge any personal liability, either of themselves or their predecessors, which has already accrued. The liability, when it has once attached, and upon whomsoever it has attached, remains fixed and unalterable. This is plain.

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Such an interpretation of the statute would be a most unfortunate one for these corporations; for I apprehend the stockholders would find great difficulty in electing prudent and careful trustees in the place of a reckless and improvident board, if the persons elected, at the moment of taking office, must become personally involved in all the embarrassments and debts of the company. A sounder and juster view of the question, it seems to me, is that a board of trustees guilty of the default in January, and retiring from office, is liable for all antecedent debts and for those only; and that the successors, if they continue the default until the next January, and no longer, are liable for the debts afterwards contracted during that year, and for no other. If the persons succeeding to office promptly obey the requirement of the act they will escape all liability, and it is plainly just that they should, because there is no failure of duty on their part. If they do not, they very properly incur the hazard of the debts which they themselves as trustees contract. This hazard they may be quite willing to incur; but there is neither principle nor policy in making them responsible for the acts and defaults of their predecessors. The general policy of the act is immunity from personal liability, but this is attended by certain conditions demanding the personal observance of the trustees. A single case may occur where successive boards may be liable for the same debts; and that is where there are successive defaults in January. By the express terms of the statute, the trustees omitting to file their statement within the first twenty days of that month are liable for all debts then existing. Now the debts then existing may be wholly or partly the very debts for which their predecessors became liable, by reason of a default in the January of the previous year. But from this liability there is a chance of escape by a simple performance of the duty required, whereas if such liability is assumed by a new board by the very act of taking office, there is no chance of escape except by refusing to serve.

I construe the statute according to these views, and it is a construction which is fatal to the plaintiff's case. The corpora-

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tion had a board of three trustees who were in office on the 1st of January, 1857, and they neglected, in that month and afterwards, to make a report as required by the act. Two of them went out in March, 1857, and were succeeded by two others. The defendant Otis is one of the latter, and he has demurred to the complaint. This suit was brought before the close of that year to recover an indebtedness represented in two notes. One of the notes is averred to have been given on the 8th of April, 1857, for goods sold by the plaintiff to the company prior to the 1st of January preceding, and the other was given in July for goods alleged to have been sold between the 8th of January and the 5th of May, 1857. These averments fail to show that any part of the debt accrued prior to the time in March, when the change of trustees took place. Consistently with the allegation, the portion represented in the note last given might all have accrued in the month of January. The trustees chosen in March, therefore, were not liable to pay for any portion of the goods, according to the view which has been taken of the statute. If the creditor had waited until January, 1858, and no report had then been made, the case might have been different.

It is scarcely necessary, perhaps, to observe that the giving of the notes by the company does not change the result. If the new trustees, on coming into office, were not personally liable for the previous debt of the company, they plainly did not become so because notes were afterwards given for the same debt.

We think the demurrer of Otis was well taken, and that the judgment should be affirmed.

CLERKE, WRIGHT, BACON and WELLES, Js., concurred.

DENIO, J. There is an implication in the section of the statute, under which it is sought to charge the defendant, that the report which ought to be made within the first twenty days of January in each year, may be made afterwards, so as to prevent further liability from attaching. This is but just, if we

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consider that the trustees in office during these twenty days are the only ones whom the statute considers delinquents. If they neglect this duty during the twenty days, they are chargeable with all the prior debts and all those contracted during these days; but their hands are not so tied up but that they may stop the incurring of further liability, by filing the report after the time when it ought to have been done. This does not, however, prove that trustees coming into office after the twenty days have elapsed, and who were not at all to be blamed for not having filed the report within the twenty days, become, by the mere act of accepting the office, liable for all the prior debts of the corporation and all which may be contracted before they have time to prepare the report. Such a construction would effectually deter any one from taking that situation in a company which had become embarrassed, and whose trustees had failed to perform this duty at the proper time; and yet it might be quite desirable that such a company should have proper trustees to retrieve its affairs. I think those whose duty it is to make the report within the twenty days, and who have failed to perform that duty, are the ones whom the statute considers the delinquents, and who are permitted to avail themselves of the *locus poenitentiae*, so far as future liability is concerned. The sentence of the statute, that all the trustees shall be liable, is subject to some limitation; for it cannot possibly extend to those against whom no neglect is imputable, as, for instance, those who in this case were in office only up to the end of December. In affixing the limitation, care should be taken that an effect be not given to the provision which would work manifest injustice. Trustees coming in, say, on the first of March, as the defendant did, would necessarily be ignorant of the state of affairs of the company, and could not make a report without proper examination; but they would at the first moment after taking the office be liable, upon the plaintiff's construction, for all prior debts, and this would be palpably wrong. Then if they would not be liable for prior debts, they would not for those subsequently contracted, unless they should remain in office until the next annual period of making the report; for it is

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those who are liable for the debts then existing who are made liable for those subsequently contracted. I am of opinion, therefore, that the judgment appealed from, which exonerates the defendant, is right, and that it should be affirmed.

DAVIES, J., concurred in this opinion; SELDEN, J., expressed no opinion.

Judgment affirmed.

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155	94

PETTY *et al.*, Trustees of Parish of Bellport, v. TOOKER *et al.*

Corporations formed under section 3 of the act for the incorporation of religious societies (ch. 60, of 1813), have no denominational character, and none can be engrafted upon them.

The legal character of the corporation is not affected by the existence or non-existence, or ecclesiastical connection, doctrines, rites, or modes of government of a church or churches formed by the corporators. The existence of the latter as organized bodies is not recognized by our municipal law.

Persons otherwise qualified do not lose their right as corporators to vote at elections by reason of their having individually, or collectively, renounced the doctrine and ecclesiastical government professed and recognized by the religious body in whose worship and services the corporate property had always been employed.

The title of trustees to office and to the control of the corporate property, is not impaired by any aberration in doctrine or church government on their part, or on that of those by whom they are elected.

The trustees can determine, by their control of the corporate property, who shall conduct the religious exercises. The only restraint is in the power of the corporators to fix the salary of the person employed.

They have, also, the power, it seems, to make such regulations in respect to the renting and occupation of pews as to exclude persons holding obnoxious opinions from becoming attendants upon worship, and thereby obtaining a right to vote. *Per SELDEN, J.*

It is only in this way, or by express condition affecting the grant of the corporate property, that its use can be restricted to the propagation of any particular form of religious belief or ecclesiastical organization.

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APPEAL from the Supreme Court. Ejectment for a church. The answer denied that the plaintiffs were the trustees of the religious corporation to which the church belonged, and averred that the defendants were such trustees, and in that character possessed and were entitled to retain the custody of the church edifice. On the trial before Mr. Justice EMOTT, a jury having been waived, these facts appeared:

In July, 1836, a Congregational Church was organized in the village of Bellport, its ecclesiastical officers chosen, and a clergyman invited to preach. In March, 1843, the persons connected with this church organization, and the attendants upon its services, held a meeting and became duly incorporated as a religious society under the general act (ch. 60, of 1813), under the name of the Parish of Bellport. The six trustees were elected, and the proper certificate made and filed, making no mention of any denominational name or preference. The property in dispute in this action was conveyed to the trustees of this corporation, and there was no dispute as to the persons holding the office until 1852. Before that time, however, there was a division in the society upon the question whether it should adhere to the Congregational or to the Presbyterian doctrine and organization. In November, 1851, the trustees then in office called a meeting of the inhabitants of Bellport, to determine it. A majority of those present at the meeting voted to "concur with the majority of the trustees in establishing this a Presbyterian meeting-house," and took measures for putting themselves under the charge of the appropriate ecclesiastical authorities of that denomination. A Presbyterian Church was thereupon organized, and a minister installed, who preached regularly in the meeting-house. The Congregational minister who had been previously employed by the society also continued to preach regularly in the meeting-house, but at a different hour from his Presbyterian brother.

Under this state of affairs, an election was held on February 21, 1852, pursuant to a notice which had been given by the direction of a majority of the trustees, in the manner prescribed by law, by the minister adhering to the Presbyterian Church,

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at public worship conducted by him. At this election, which was regularly conducted, and at which no members of the society were excluded from voting, two of the trustees whose term of office was about to expire, were re-elected. The board of trustees thus constituted is represented, through successive and unquestioned elections, by the defendants in this action.

The plaintiffs make title under an election held on the 24th February, 1852, in pursuance of a notice given by the Congregational minister, under the direction of a minority of the trustees. At this election four trustees were chosen; two in place of the trustees whose terms were about to expire, and two others in place of trustees whose terms did not expire until March, 1854, but who were declared to have "seceded from this religious society." Members of the society, who were entitled to vote, were excluded on the ground that they adhered to the Presbyterian organization.

The judge decided that the election of February 21, 1852, was valid, and that the defendants were consequently the legitimate trustees of the corporation. He ordered judgment in their favor, which having been affirmed at general term in the seventh district, the plaintiffs appealed to this court. The case was submitted on printed arguments.

George Miller, for the appellants.

W. P. Buffett, for the respondents.

SELDEN, J. This is a contest between two sets of individuals, each claiming to be trustees of the parish of Bellport; and the action is brought to recover possession of the church edifice, and the lot upon which it stands; from which the plaintiffs, as they allege, have been excluded by the defendants. The first position taken by the defendants is, that their title to the property cannot be tried in this action, but that the plaintiffs must resort to the mode prescribed by statute for testing their rights.

The present statutory provision on the subject is contained in the Code. Section 482 provides that an action may be brought

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by the Attorney-General, in the name of the People of the State, upon his own information, or upon the complaint of any private party, against any person who shall usurp or intrude into any public office, or "any office in any *corporation* created by the authority of this State." This no doubt is in ordinary cases the most appropriate and convenient way of trying the title of any one, to a corporate office; and in cases where no right of property is invaded, it is frequently the only way. But the legal title of the church and lot in question here, is absolutely vested in the trustees of the corporation; and I am inclined to the opinion that if those who are justly entitled to that office have been wrongfully excluded from the possession and control of the property, they may maintain an action in their own names to recover ~~that possession~~. I have, however, given to ~~this~~ question but a slight examination for the reason that, in the view I take of the case, it is not important to settle it. Neither have I examined very critically to see whether the case shows an actual exclusion of the plaintiffs by the defendants; but have assumed, as the counsel on both sides seem to have assumed, that an ouster of the plaintiffs in their character as trustees, though not as individual corporators, is established. The question then is, upon the right of the plaintiffs to be considered as the trustees of the corporate body. The corporation itself was unnecessarily and improperly made a party, and will be disregarded.

The whole theory of the plaintiffs' case rests obviously upon the assumption that as the religious society in Bellport was, from its commencement in 1836 to its incorporation in 1849, Congregational in its character, this feature of Congregationalism entered as an element into the act of incorporation, so that the society became incorporated, not merely as a religious, but as a Congregational society.

This assumption is clearly unfounded. Corporations formed under the 3d section of the act of 1813, have no denominational character, nor can such a character be in any manner engrafted upon them. That portion of the members organized into a separate body called the church, may belong to a peculiar

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denomination, but it has no power to impress its distinctive character upon the corporation, so as to render it ineffaceable by the voice of a majority of the corporators. These two bodies, viz.: the corporation and the church, although one may exist within the pale of the other, are in no respect correlative. The objects and interests of the one are moral and spiritual; the other deals exclusively with things temporal and material.

The existence of the church proper, as an organized body, is not recognized by the municipal law; nor does its existence or non-existence, or its denominational character or connections, in any manner affect the legal nature of the corporation. Each as a body is entirely independent, and free from any direct control or interference by the other; and yet it is easy to see that the majority of the corporators, if so disposed, may, through their control over the property and revenues of the society, exercise an important incidental influence upon the character and destinies of the church. The present case illustrates the manner in which this influence is exerted. The plaintiffs' counsel is clearly mistaken in supposing that the meeting of the 28th of November, 1851, wrought the change of which he complains. Even if that had been a meeting of the members of the *parish* of Bellport, instead of being, as it was, a meeting of the *inhabitants* of the village of Bellport, its proceedings could *per se* have had no effect upon the sectarian character of the society. That depended upon the rules and ordinances of the church, with which the corporation, as such, had nothing whatever to do. Neither the proceedings of that meeting, nor the subsequent action of the Presbytery in organizing a Presbyterian Church, were in themselves of any legal consequence. They were only important as indicative of the views and sentiments of a majority of the members of the society, and of the manner in which they would be disposed to exercise their legitimate corporate powers.

The change in the character of the congregation, of which the plaintiffs complain, has been brought about, not by the proceedings of the Presbytery, or the resolutions of the society

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but by the action of the trustees in employing a Presbyterian clergyman, and opening the meeting-house to his ministrations. This they had a legal right to do. The trustees are the representatives of the corporate body, and the statute invests them with extensive powers. They are entitled to the possession and management of all the property of the corporation, and are empowered to exercise its entire administrative functions. The legislature has been careful to guard against the abuse of this authority, by providing, in section 8, that the salary of the minister shall be regulated, not by the trustees, but by a majority of the corporators, at a meeting called for that purpose. Subject to this important and most efficient check, the trustees have the undoubted power of determining by whom the pulpit shall be occupied. It is quite apparent that this power, which the statute plainly confers, must of necessity give to the trustees and a majority of the corporators, when united, virtual control over the forms and ordinances to be observed. The act for the incorporation of religious societies was obviously framed with a view to, and in accordance with, that just and sound principle which lies at the basis of all our civic institutions, viz.: that in every organized society, the controlling power should be in the hands of the majority.

This may, in some instances, as perhaps it does in the present instance, operate with severity and apparent injustice by enabling those who have recently become members of the society, if in a majority and so disposed, to change its religious character and modes of worship, against the will of its original founders and chief contributors. But the evil arising from these rare cases is more than counterbalanced by the effect of this legislation in putting an end to religious controversy, and removing from the civil tribunals a species of litigation with which they are in general quite unqualified to deal.

But while our laws have thus secured to every incorporated religious society the power, as a general rule, to modify, from time to time, its ordinances and forms, so as to harmonize with the views and wishes of the majority of its members, they also afford to those who may desire it ample means of guard-

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ing against any radical change. If a body of persons of homogeneous views, upon becoming incorporated, are desirous of maintaining unchangeable forms, a uniform faith, and permanent religious connections, there are two modes in which this object can be accomplished. One is, by causing their church edifice and lot to be conveyed to the society, upon the express condition that it should be forever thereafter devoted to the purposes of religious worship by a congregation maintaining a certain faith, and observing certain prescribed ordinances and forms. Such a condition inserted in a deed to the society, if definitely and clearly expressed, would be valid, and would no doubt operate as an effectual guaranty against any change in the religious character of the society.

But the provisions of the act itself, under which such societies are incorporated, suggest another mode by which permanence and steady and unchangeable forms may be secured. Section 7 provides that no person shall become a member of such society after its incorporation, and entitled to vote at any election, unless he has been "a stated attendant" on the worship of the society for at least one year before such election. Now the society has obviously, through its trustees, full power to determine what persons it will thus admit to membership. It is under no obligation, more than any other organized association, to receive obnoxious persons, or those likely to create either disturbance or division. The trustees own and control the church edifice, and are expressly authorized, by section 4, "to regulate" the renting of the pews, and may of course adopt such rules on the subject as they may deem expedient. The act evidently contemplates that the society will, or at least may, discriminate among those desirous of uniting with it. The latter portion of section 7 provides that "the clerk to the trustees shall keep a register of the names of all such persons *as shall desire* to become stated hearers in the said church, congregation or society, and shall therein note the time when such request was made; and the said clerk shall attend all such subsequent elections in order to *test the qualifications* of such electors, in case the same should be questioned."

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This provision looks to a formal application, in each instance, to the corporate authorities for admission into the society; and the trustees may no doubt adopt such regulations that no pew can be rented originally, or sold or assigned to a new occupant, without their previous consent, or even that of the society itself.

If, however, a society, instead of adopting these appropriate and effectual precautions, chooses to throw open its doors to the public at large, and invite in new members, irrespective of their personal character or religious tendencies, they have no reason to complain that the powers and privileges of their new associates, whom they have voluntarily received, and of whose contributions they avail themselves, should be the same as their own.

It follows from these principles, that the change in the religious character of the parish of Bellport has been produced by the exercise by the trustees, and the majority of the corporators, of their legitimate powers. The idea upon which the plaintiffs rest the regularity of their election as trustees, viz.: that the defendants and those who elected them, were to be regarded as seceders from the society, has no legal foundation. Seceders from Congregationalism, in a religious sense, they may have been; but this could not disfranchise them as corporators. The corporators are those who can vote at the elections; and their qualifications are, as we have seen, prescribed by the statute. If they have been stated attendants upon the worship of the society for one year next before the election, they are entitled to vote. Nothing else is required; and it is plain that there is no power which can add to these qualifications, or which can properly say to one who possesses them that unless he also adheres to the peculiar faith and governmental forms of the society he cannot vote. Every election at which persons are prohibited from voting upon any such ground is of course illegal. Secession from the doctrines or faith of the church is a purely religious offence, and the ecclesiastical judicatories alone can take cognizance of it.

As between the two elections, therefore, of the 21st and 24th of February, 1852, to which the plaintiffs and defendants

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respectively trace their title as trustees, there is no doubt which is to be considered as legitimate and regular. It would be difficult, under the proof, to discriminate between these two elections, in respect to the regularity of the meetings at which they took place. Each purports to have been called pursuant to the statute; and hence if their proceedings had been properly conducted, there would have been nothing but the order of time to give precedence to either. But the case shows that at the election on the twenty-fourth, all those members of the corporation who adhered to the Presbyterian organization were prohibited from voting, on the ground that they were seceders from the society. This is entirely fatal to that election, and no rights dependent upon it can have any validity. No such objection attaches to the election of the twenty-first, and there is nothing whatever to impeach its regularity. The defendants therefore, who deduce their title by regular succession from this election, must be regarded as the legitimate and rightful trustees of the corporation.

The judgment of the Supreme Court must be affirmed.

All the judges concurring,

Judgment affirmed.

ROSE v. BUNN *et al.*

The qualification of a grant of lands, by the words "grass, herbage, feeding and pasturage only excepted," if not good as an exception or reservation, is effectual to create an easement in the grantor to enter and depasture the lands.

Where the grantor retains such an easement, and the grantee has the right to plow and plant such arable parts of the tract granted as he may elect, with general liberty to take timber for fencing without restriction to the arable land, and subject to a provision requiring him to leave the lands he may till uninclosed by fences from October to April, the duty of fencing is upon the grantee; and in defect of fences he cannot distrain the grantor's cattle damage feasant.

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APPEAL from the Supreme Court. The action was in the nature of replevin for the taking of three hundred and twenty sheep. The answer set forth that the defendants, and several other persons named, were possessed of a certain close upon the Shinnecock hills, in the town of Southampton, in the county of Suffolk, and that the sheep mentioned in the complaint were wrongfully upon the said close, eating and destroying the corn there and doing damage, wherefore the defendants, and the other persons, took them as a distress, as they lawfully might, &c.

The parties entered into a stipulation by which it was assumed that the sheep came upon the *locus in quo* by reason of a defect of fences, and agreed that the only questions to be litigated on the trial should be whether the defendants had a right to plant corn on the premises, and whether, if they did, they were obliged to protect the crops by fences to be maintained by themselves.

On the trial, the plaintiffs gave in evidence a conveyance in fee from certain Indian sachems of the Shinnecock tribe, in behalf of themselves and their people, to the trustees of the town of Southampton, of a considerable tract of land, embracing the premises in question, dated August 16, 1703; and also an instrument called a lease from the grantees in the first mentioned conveyance to the grantors, "and their people" of the same premises. By the last mentioned instrument, the trustees of Southampton assumed to demise, grant and let to farm the premises aforesaid to the lessees, upon the conditions and provisos afterwards expressed, for a term of one thousand years from the date; the lessees yielding and paying the lessors annually one ear of Indian corn. At the end of the description of the premises, the instrument proceeded: "meadows, marshes, grass, herbage, feeding and pasturage, timber, stone and convenient highways only excepted; with all and singular the privileges and advantages of plowing and planting, and timber for firing and fencing, and all other conveniences and advantages whatsoever, excepting what before is excepted, to the only use and behoof of said Indians, their heirs and successors,

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&c., provided always the said Indians do not keep nor cause to be kept any part or parcel of the land within fence or enclosed from the last day of October to the first of April, from year to year, during the whole time aforesaid."

Certain parol evidence was introduced to show the practice of the Indians and those having interests under them; from which it appeared that the premises included in the conveyances consisted in part of salt marshes or meadows, and in part of hills susceptible of cultivation, and that the Indians, and the white people who hired of them, had been accustomed to plant these hills, and sometimes to fence their cornfields and sometimes not to do it. During the season in which the sheep were distrained, the Indians, for the first time in about ten years, planted corn on the premises in several detached parcels, separate from each other, none of which were fenced. They were interspersed among the pasture land. The parcels thus planted were nineteen in all, and of different sizes. The white people have always been in the habit of pasturing the hills with cattle and sheep. It was proved by an aged witness, that they had been accustomed to do so seventy years, to his knowledge. When fences had been heretofore made around the cultivated portions, these inclosures were thrown open on the first day of November.

At the close of the evidence the parties agreed that the jury should be dismissed, and that the judge should decide the case in the same manner as though it had been tried by him without a jury. He subsequently decided the case in favor of the plaintiff; and the judgment thereupon entered was affirmed at a general term in the second district. The defendants appealed. The case was submitted on printed arguments.

Miller & Tuthill, for the appellants.

William Wickham, for the respondent.

DENIO, J. It is the most favorable position for the defendants to assume that the lease of 1708 insured, according to

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its terms and obvious intention, to the use of the Shinnecock Indians in perpetuity, or at least during the long term granted, as though they bore a corporate character which would authorize them to take and hold land as a tribe; and I shall accordingly so assume. It might be difficult, however, to maintain that they possessed such a capacity in respect to private grants and conveyances, if the case turned upon that question. The controversy must therefore depend upon the proper construction of the instrument given in evidence, and its legal effect. It contains general words of grant and demise of the whole of the premises contained within the boundaries specified; but these are greatly qualified by what follows. The meadows and marshes were excepted; and they were proper subjects of an exception, according to the technical rules referred to by the defendants' counsel; and so with the timber, stone and highways. It is objected that the "grass, herbage, feeding and pasturage," which are also excepted in terms, being the annual profits of the land, cannot be excepted or reserved to the grantees, such reservation being, as it is argued, repugnant to the grant; and, moreover, that being things not in existence at the time of the grant, they cannot be the subject of an exception. But I am of opinion that the restriction, whether it be called an exception or a reservation, is an effectual qualification of the grant, by which the lessees, by accepting the deed, are bound. The right of the grantors, and those whom they represent, to enter with their cattle to depasture the land—assuming the general title to pass to the lessees—was such a servitude or easement as may be legally created by the acceptance of a deed reserving such rights. (*Hills v. Miller*, 3 Paige, 254; *Child v. Chappell*, 5 Seld., 246, 253.) Besides servitudes, or easements as they are now called, may be established by prescription; and it was shown that the rights which the deed professes to create in favor of the lessors, had been continually exercised by the inhabitants of Southampton, for a great length of time. The evidence renders it probable that they had been from the time of the execution of the lease.

Enough has been said to show that the plaintiff, as an

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inhabitant of Southampton, had a right to turn his sheep upon the premises, and that he was not a trespasser in so doing. But, consistently with this privilege, the Indians had a right to plow and plant the arable parts of the land, provided they threw down their inclosures in the autumn, and suffered them thus to remain until spring. The respective rights of the parties then were as follows: the plaintiff had the general right of pasturage upon the whole of the premises during the whole year, subject to the defendants' right to inclose and cultivate the arable portions during seven months. These arable parts were the hill sides, which seem to have been interspersed among the meadows, marshes and pasture lands. It was for the lessees to elect whether they would cultivate, and upon what portion they would thus exercise their rights. This relative situation of the parties, points out very plainly who were to be at the trouble and expense of securing the crop against the intrusions of the animals, whose owners had a general right to turn them upon the premises. The party whose right it was to select the parts he wanted cultivated, was the one whose duty it was to protect the portion so selected from the intrusion of the animals, who, until such selection, had a general right to be upon every portion of the premises. The case has no analogy to that of persons owning adjoining lands, where by the common law each proprietor was obliged to keep his domestic animals on his own land, and where, by the statute, the fences are to be divided. The provision by which the Indians were allowed to take fencing timber, and that by which they were forbidden to maintain inclosures during a part of the year, confirms the view I have taken of the case. I am satisfied that the Supreme Court was right in holding that it was for the lessees to secure the portions of land which they chose to cultivate, against the cattle of the lessors lawfully being upon the remainder of the premises, and that the taking of the plaintiff's sheep, as a distress, cannot be sustained. The judgment must be affirmed.

All the judges concurring,

Judgment affirmed.

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MARSHALL *et al.* v. MOSELEY.

As between tenant for life and remaindermen, rent accruing upon leases executed by the testator of the parties, and becoming due after the termination of the life estate, cannot be apportioned.

It is immaterial that the tenancy for life is created by the testator as a provision for his widow.

The devisees in remainder of the premises out of which the rent issued, may maintain a joint action against the executor of the life tenant for rent collected by him, which became due after the termination of the life estate.

APPEAL from the Superior Court of the city of Buffalo. Action for money had and received to the use of the plaintiffs, devisees in remainder of real estate in Buffalo under the will of Bela D. Coe deceased. Mr. Coe died seized of the Mansion House, occupied as a hotel with stores in the basement, in the city of Buffalo and other premises, having in his lifetime executed leases of the hotel and stores to various persons, which by their terms were to expire May 1, 1855; the rents upon such leases being payable quarterly. He died in November, 1852. By his will, dated March 13, 1852, he devised to his wife Elizabeth in fee, his dwelling-house and appurtenances, and bequeathed to her all his furniture and household goods, books and pictures, carriages, horses, barn and garden utensils, and family pew. He also devised and bequeathed to his wife during the term of her natural life "the Mansion House in the city of Buffalo, as owned by me, and all and several the rents, issues and profits thereof." He devised his real estate at Black Rock, and two lots of land in Michigan, to a cousin, and another party not a relative: directed the rest of his personal estate to be applied to the payment of his debts, (except a mortgage on his dwelling-house, which was to remain a charge thereon); the remainder of his debts, over and above what could be paid by his personal estate, to be a charge upon the Mansion House property, to be paid therefrom after the

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life estate of his wife. All the residue, remainder and reversion of his estate, real and personal, was devised, one-third part to each of the plaintiffs in fee; two of them being married women, a niece of the testator and the sister of his wife, and the third a nephew. He appointed the defendant Moseley as one of his executors. His widow intermarried with the defendant Moseley, and died April 5, 1855, having by her will made the defendant her executor and residuary legatee. On the 1st of May, 1855, the defendant collected the rents of the Mansion House property due for the quarter then expired. He apportioned the amount thus collected according to the periods between the commencement of the quarter and April 5, and between that date and May 1; paying to the plaintiffs \$588, and retaining as executor of his deceased wife, \$1,232. The plaintiffs having demanded this sum, claimed to recover it with interest from the time of demand. These facts having been proved the defendant moved for a nonsuit on the grounds that he was entitled to apportion the rent; that the plaintiffs could not maintain a joint action, but each should have sued for his separate share, and that the husbands of the married plaintiffs should have joined in the action. It was refused, and the plaintiffs had a verdict and judgment. After an affirmance of the judgment at general term, the defendant appealed to this court.

E. C. Sprague, for the appellant.

John Ganson, for the respondents.

CONSTOCK, Ch. J. Mrs. Coe, by virtue of her husband's will, had a life estate in the premises, out of which the rents in question accrued, and the plaintiffs owned the remainder in fee. She died April 5, 1855, the leases being then unexpired. On the 1st of May following, the rents became due for the preceding quarter of a year. The defendant is the executor and residuary legatee of Mrs. Coe, and having collected the rents for the whole quarter, the principal question in the case is, whether he is entitled to apportion them by dividing the quar-

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ter into two periods of time, one before and the other after her death, and by retaining in his own hands the portion which accrued before that event.

As rent follows the reversionary estate, the law allows it to be apportioned where that estate becomes divided amongst different owners. This is according to the maxim, "*accessorium sequitur naturam sui principalis.*" Thus if a reversion descend on the death of the ancestor who gave the lease, and the coparceners or heirs make a partition, the rent will be apportioned in favor of each of them. So if the reversion be severed by will or even by conveyance of the owner, the same result will take place. (2 Platt on Leases, 131, 132, and cases cited.) But the same reasons never existed for apportioning rent on the principle of time where the tenant was bound to pay it at stated periods. The sum accruing between each of the times of payment was a single entire debt, and was due only on the condition precedent of the tenant being entitled to enjoy the premises for the time in respect to which it was payable. If, therefore, a person having a life estate, with no power to make a lease to continue longer than during his life, should make a lease for years reserving rent half yearly, and should die in the middle of a half year, the rent, according to the principles of the common law, would be lost for the half of a year. The executor or representative of the lessor could not recover it because by the nature of the contract the lessor was not entitled to it except in the sums and at the times specified in the lease. His successor in the reversionary estate could not claim it for the additional reason that the reversion was not his until the lease itself was terminated by the death of the life tenant who gave it. If the lessee continues to hold afterwards, such holding is necessarily under some new contract with the party on whom the estate has devolved. (Woodfall's Land. and Ten., 248; 1 Salk., 65; 1 P. Wm., 392; 2 Id., 501, 502; 1 Man. & Gr., 589, 18 N. H., 343; 11 Mass., 493.)

If, however, the lease continues, although intermediate the days of payment the reversion passes wholly into new hands, the obligation of the lessee to pay rent continues also. Thus

in the middle of a quarter the lessor may convey the whole estate which is under the lease, or it may be sold under execution or mortgage, or he may die leaving it to descend to his heirs, or he may dispose of it by will. The lease itself is unaffected by these events, and the rent is therefore payable as though they did not occur; but it is payable only in the sums and at times specified in the demise. The reversion may be transmitted to a new owner during a period between the days of payment, but such an event does not divide the obligation of the tenant. The accruing rent follows the reversion wherever that goes, and neither the former owner nor his representative can recover any portion of it. Being recoverable only in a single sum and not until the prescribed day of payment, the common law gives it to him who is the reversioner at that time, and no case can be found where a court of equity has adopted a different rule. Says Mr. Woodfall (*Law of Landlord and Tenant*, 248), "at common law rent cannot be apportioned, but the reversioner becomes entitled to the accruing rent from the rent day antecedent to the decease of the tenant for life, whose representative was entitled to the arrearages due at some rent day before the death of the testator, or the intestate; for the law does not apportion rent in point of time nor does equity." (See also 2 Greenleaf's *Cruise*, p. 116, §§ 44, 45, 46, *Ex parte Smyth*, 1 Swanst., 337, and note, and other cases cited, *supra*.) It is true there are in the English books some cases of a peculiar kind, where on the death of a tenant for life before the day of paying rent for the current quarter or other period, the rent has been divided between his representative and the remainderman; but these are all cases in which the lease terminated on the decease of the life tenant; either because he had no power to lease so as to affect the remainderman, or because if such a power was given to him it had been defectively executed, and the lessee, holding the premises until the rent day, voluntarily paid the whole to the person who succeeded to the estate. In all the cases of this kind the lessee was not at common law bound to pay at all for so much of the time since the last rent day, as had elapsed

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before the death of the tenant for life, but having conscientiously paid for the whole time, the person who took the estate in remainder was held by the courts of equity to have received for the use of the executor, of his life tenant, so much of the rent as accrued beyond his decease. (*Ex parte, Smyth, supra; Paget v. Gee*, 1 Ambler, 199.) In these instances the rent actually paid was apportioned or divided on the principle of time; but cases of this kind have no tendency to show that such an apportionment can be made when the lease remains as before, notwithstanding a change of parties entitled to the rents takes place intermediate the rent days. The lessee in that case is bound to pay for the whole time, and the reversioner, or remainderman, takes the rent as an entire sum due to him by the terms of the contract.

The well ascertained rules of the common law are, therefore, opposed to the claim of the defendant to retain any portion of the rents received by him for the quarter during which his testator, the life tenant, died. The leases were not determined by that event, and the plaintiffs, who as remaindermen succeeded to the reversion, were entitled to the whole of those rents. It has also been observed that the courts of equity have never departed from the rule of law on this subject.

It seems hardly necessary to say now that there is no legislation of this State which the defendant can invoke in support of his claim. In England, one of the rules of law in regard to apportionment of rent was abrogated by an act of Parliament, passed in the reign of George II. That statute (2 Geo. II, c. 19), after noticing that by the existing rule rents were frequently lost, where a lessor having only a life estate died before or on the day when it would be payable, declared that when any tenant for life should happen so to die, his executor or administrator might recover the whole rent in arrear, in case such death took place on the day fixed for payment, or if it happened before that day, then a proportion, according to time, making all just allowances, &c. That legislation, with some change in phraseology, has been followed in this State. Our statute (1 R. L., 438; 1 R. S., 747, § 22) provides that when a ten-

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ant for life, who shall have demised lands, shall die before the day when any rent is to become due, his executors may recover "the proportion of rent which accrued before his death." In the case provided for, therefore, rent can be apportioned in opposition to the rule of the common law, and a recovery had, where, but for the statute, the rent would be lost. But the statute does not include the present case. The leases in question were not given by a tenant for life, but by the owner of the fee, and the disputed rent was not liable to be lost, because the plaintiffs, succeeding to the reversion, could recover the whole of it by action founded on the very leases themselves. The English statute, like ours, was enacted to remedy the apparent injustice of the rule which absolved a lessee from paying any rent, where his interest was determined between the rent days by the expiration of a life estate on which the lease depended. More recent legislation in England has gone still further. The statute of 4 W. IV, c. 22, after reciting that by law rents due at fixed periods were not apportionable, and after reciting the inconvenience of that rule, proceeds to declare that all rents made payable at such periods under any instrument executed after the passing of the act, should be apportioned so that on the termination, by death or any other means, of the estate of the person entitled to the rents, such person, or his representative, should have a portion of such rents, according to the time elapsed since the last period of payment. By a further provision, the entire rent is to be received and recovered from the tenant, by the person who would be entitled to recover it if the act had not been passed, and is to be held by him subject to apportionment, which can be enforced against him by suit at law, or in equity. It will be seen that this statute recognizes the old rule, while it declares a new one for future leases, and that it also carefully protects the tenant against more than one action for the entire rent. We have no such legislation in this State. If we should adopt the principle of that statute, in regard to apportionment, without legislative interference, we should not only change the existing law, but the change must be made without the protection to tenants which the English

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statute secures. If we declare rent to be apportionable in cases like the present, it will follow, according to our rules of pleading and practice, that each party entitled to a share may sue the tenant to recover it. To illustrate, if the defendant has no interest in the rents now in question, then he cannot retain the portion in his hands. If he has an interest, then to that extent he could, under our practice, recover so much as belonged to him, by suit against the tenants, if they had not paid these rents. And I think that even a notice to the tenants of his claim to a share, would take away from them their right to pay the entire sum to the persons who, as remaindermen, would be entitled to the other share. To conclude on this point, we find that the rule of law denying apportionment in a case like this, has never been shaken; and whatever may be the arguments, founded in justice or expediency, in favor of a different rule, we think those arguments should be addressed to the legislature, rather than to the courts.

The life estate and the remainder in fee, between which the apportionment is claimed, were created by the will of Mr. Coe, by whom the leases were given, and it has been insisted that we ought to construe the will favorably to his widow, and on that ground allow the apportionment to take place. But we see no room for any construction which will take the case out of the general rule of law. Of course the life estate given was intended by the testator as a part, and perhaps the principal part, of the provision made for his widow, but it was given simply as a life estate, with remainder over to the plaintiffs; and it does not appear even to have been in lieu of dower in any other real estate which he may have owned. The widow became entitled to the rents as incident to her life estate in the reversion; but as that estate terminated between the periods for payment, the rent accruing, but not yet due, became at once annexed to the estate of those who succeeded her in such reversion. No part of it could be severed at that point of time. To make an exception in such a case, to the general rule, would be virtually to deny the existence of the rule altogether. It may be well to observe that rents are unlike annuities, and un-

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like the interest of money. They issue out of land, and are a part of the land. They are less capable of division, or apportionment, according to a precise measure of time, because the value of the tenant's enjoyment may be quite different at different periods of the year, and the value, moreover, may very much depend on the enjoyment for the full time specified in the lease.

It was also claimed in the argument, that an amicable apportionment of the rents in question was made between the defendant and the other parties interested—they allowing him to retain, without objection, such portion as accrued before the death of Mrs. Coe—and that this arrangement ought to be held conclusive; but we think that nothing was done having any legal significance. If the plaintiffs had collected the rents from the tenants, and then, under a mistake of the law, had voluntarily paid to the defendant the share which he claimed, it is quite likely they could not recover the money back. But such are not the facts. The defendant appointed an agent who collected the entire rents of the quarter for him, and he then divided them according to time, and paid over to the plaintiffs so much as accrued after the death of the tenant for life. The most that can be said is that they received so much of the fund, without claiming, at the time, any more. I do not doubt that all the parties misapprehended the rule of law on the subject, but I see nothing in the facts which extinguished the right of the plaintiffs to the whole rent. Their right of action against the defendant arose when he received the whole, and nothing afterwards happened which impaired that right; their acceptance of a portion of the sum which belonged to them, without making further claim at the time, clearly could have no such effect.

The remaining question is, whether the plaintiffs can maintain the action jointly? We are of opinion that they can. If the rents had not been collected from the tenants, the plaintiffs, to whom it belonged, as tenants in common of the reversion, might have joined in an action to recover it. This rule appears to be extremely well settled; the only doubt suggested by the

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authorities being, whether they could sever in their suits, if they had elected to do so. (*Sherman v. Ballou*, 8 Cow., 304; *Decker v. Livingston*, 15 Johns., 482; *Decharms v. Horwood*, 10 Bing., 526; *Martin v. Crompe*, 1 Ld. Raymond, 350; *Hill v. Gibbs*, 5 Hill, 56.) These authorities will also show that the plaintiffs, having the same common interest in the money which the defendant received, as rent which belonged to them, can unite in their action to recover it out of his hands; and this we think is also clear on principle. We are, therefore, of opinion that the judgment must be affirmed.

DENIO, SELDEN, WRIGHT and WELLES, Ja., concurred.

CLERKE, J. (Dissenting.) Bela D. Coe, of Buffalo, by his last will and testament, bearing date March 13th, 1852, devised to his wife Elizabeth, and to her heirs and assigns, forever, his dwelling-house and lot of land in that city, with the appurtenances, and, for and during the term of her natural life, the premises known as "the Mansion House," and all and several the rents, issues and profits thereof. He also gives to her, forever, his furniture and stock, and the family pew in the First Presbyterian Meeting House. After devising to two other persons some land at Black Rock, near Buffalo, and providing for the payment of a mortgage on his dwelling-house, and other debts, he bequeathes and devises all the residue of his real and personal estate to the three plaintiffs in this action.

Some time after his death, his widow married the defendant, William A. Moseley. The Mansion House property, which Mr. Coe left to his wife, during her life, was subject to certain leases executed by him, which were unexpired at the time of Mrs. Moseley's death. The rents of this property were payable quarterly, on the 1st of February, 1st of May, 1st of August, and 1st of November, in each year, except under a supplementary lease upon a portion of the premises, by the terms of which the rent was payable semi-annually on the 1st of November and 1st of May. In fact, however, the rent reserved in this supplementary lease was paid quarterly.

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Mrs. Coe, afterwards Mrs. Moseley, became legally possessed of the premises thus given to her for life, and received the rents which fell due during her lifetime.

She died on the 5th of April, 1855, and by her will, which was proved on the 11th of July, following, the defendant was made her sole executor and residuary devisee and legatee.

It will be seen that she died twenty-five days before a quarter's rent was due; and the principal question in this case is, whether her executor is entitled to the proportion of the quarter's rent accruing up to the 5th of April, 1855, or whether the plaintiffs, as remaindermen, are entitled to the whole quarter's rent falling due on the 1st of May, 1855.

It will be perceived that the position of Mrs. Coe, in relation to this property, was not that of an ordinary tenant for life, but that of a widow, whose husband, by careful provisions in his will, endeavored, with but a small exception (the devise made in the second section), that she should enjoy, during her life, the whole income of his estate. He gives her the house in which he lived and died, with its grounds, appurtenances, furniture, books, pictures, his horses, harness, barn and garden utensils, barn stock; and he also gives her the family pew. This evidently shows that he intended she should continue the family establishment in its accustomed style; and for this he appropriates nearly the whole income of his estate, which he expressly says she shall enjoy "for and during the term of her natural life;" not until two months and five days, or any time, short of her natural life; but for the term, the whole term of it. Can any one say, from the entire plan and context of this will, that he intended to have her income cut short, under any contingency? Where is the ground for this supposition? Is it in any principle of law? Is it in any phraseology employed in the will? He intended one thing or the other; he intended either that she should enjoy this income to the very day of her death, or for a shorter period, absolutely or contingently; certainly not absolutely, and I see no possible pretext for saying that he intended she should have it for a shorter term than that of her natural life, under any contingency whatsoever.

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As I have said, the dwelling-house was given to her to live in, and the income to defray the expenses of supporting the establishment. We must presume that he expected his wife would expend the income, for this purpose, as it accrued; and, as it became payable, that she would apply it for the payment of her debts and her current expenses. After the quarter day previous to her death, she would employ her rents, then coming in, to defray her household and personal expenses incurred to that day, which, probably, required the whole of the receipts to which she was entitled at that time. But if her estate is not entitled to any proportion of the rent accruing in the subsequent quarter, she would have absolutely nothing with which to support her establishment and defray her personal expenses, for two months and five days. Her money being legitimately expended, and expended in conformity with the wishes of the testator, in maintaining the family establishment up to the 1st of February, 1855, she would be destitute of resources to satisfy the wonted expenditure, necessary after that time, if she should happen to die one day before the 1st of May, following. Surely he never intended this; at least we find nothing in the language or scope of the will to warrant such a conclusion.

It will not be denied, if he said in express terms that his wife should have the due proportion of the quarter's rents, if she should happen to die before the expiration of the quarter, that her estate would be entitled to it. The rule of the common law, contended for by the respondent, certainly could not deprive her representative of it. I am just as well satisfied, from the language and tenor of the will, that such was his intention, or, at all events, that he contemplated no other intention, as if he had expressly declared it.

These considerations, in my opinion, would be sufficient to determine the principal question in this case; at all events, they show the testator's intent so satisfactorily, that the rule adverted to must be absolute, unbending, and beyond all question imbedded in our jurisprudence, to warrant its application in this case.

Does this ancient rule so positively retain its position in our

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law, as to produce this effect? Or has it any vitality at all; or may it not be considered in fact obsolete?

Undoubtedly, by the common law, in England, rent cannot be apportioned in point of time; and the reversioner, or remainderman, received the rent accruing on the rent day subsequent to the decease of the tenant for life, whose representative was entitled only to the arrears due at some rent day before his death.

This rule originated in feudal times; and it arose, in all probability, in part, out of the nature of the services which the vassal rendered to his lord as a compensation for the use of the land, and in part out of the nature of the remedy given to the lord to enforce those services. Those services were, in a great degree, personal and corporeal, accompanied in rent service with fealty and homage. Indeed, from the very name of rent service, for which, to use the language of Littleton, the lord may distrain as of common right, we find it had always some corporeal service incident to it. This service consisted of certain labor, as tilling the land occupied by the lord himself following him, or doing suit to him, in his courts in times of peace, and in his armies, or warlike retinue, in time of war. It would have been extremely inconvenient, and inconsistent with the usage and polity of the times, to have these services apportionable. If the vassal was bound to render one portion of them to one lord, and a second portion to another, he might in those turbulent days, when the barons were continually in strife with each other, be compelled to serve two hostile masters, each having equal claims on him at the same time, and it might have been a violation of his fealty to both to serve either. The service could not, with any kind of convenience, be severed.

So with regard to the great remedy by which the lord was able to enforce his claim on the vassal. It was deemed exceedingly oppressive that the tenant should be subject to two or more several distresses, of two or more several lords; and, therefore, Coke says in his note to section 225, liber 2 of Littleton: "If there be lord and tenant, by fealty, and certain rent, and the lord by deed grant the rent in fee, saving the fealty, and

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grant farther, by the same deed, that the grantee may distreine for the same rent in the tenancy, albeit a distresse were incident to the rent in the hands of the grantor, and although a tenant attorne to the grantee, yet cannot the grantee distreine; for the distress remains as an incident inseparable to the seignery, for then the tenant should be subject to two several distresses of two several men."

These, certainly, are reasons which have no applicability to the condition of society in this country or state, or even modern England; and, I may as well remark here, that many of those ancient rules, which have been incorporated into the common law, are as incompatible with our social and political structure as many of the maxims of the Koran are with the genius of Christianity. For this reason alone, they should cease to be part and parcel of our law. The common law, we know, is not a stiff and inflexible system, immutable, like the laws of the Medes and Persians; but, its distinguishing characteristic is, that it is pliable, accommodating itself to the circumstances of society; and this characteristic is in truth as much a part of the law as any of its direct and positive maxims. The judges, therefore, are not obliged, before they can pronounce a rule obsolete, to wait for the intervention of the legislature. When the reason for the rule ceases, they have the right to renounce it.

I am not aware of any direct and positive recognition, in the courts of this State, of the rule, to the full extent, for which the respondent contends. He claims that it was an undoubted rule of the common law of England; and the common law as it existed on the 19th of April, 1775, in the Colony of New York, being the law of this State, except so far as it has been altered by the legislature, he claims that the rule is in full force now. The answer to this is, that the reason of the rule has ceased; that it is totally repugnant to our social condition; that it is manifestly unjust; that in its application to many analogous cases, it has been abrogated by judicial and legislative authority; and that it is, in this State at least, obsolete. Formerly this rule was not confined to rents; and servants' wages, annuities,

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and any payments, payable at stated periods, could not be apportioned. But it is, confessedly, no longer applicable to these cases.

In conformity with this rule, if a tenant for life made a lease for years, and died the day before the rent was due, which was not payable until the last moment of the day upon which it is expressly reserved in the lease, the rent was lost both to the reversioner and the representative of the tenant for life; and the law being so, equity would not relieve. This, however, was expressly remedied in England, by 2 Geo. II, c. 19, § 15; which has been substantially adopted by the legislature of this State. (1 R. S., 747, § 16.) This statute provides "when a tenant for life, *who shall have demised lands*, shall die before the day when the rent becomes due, his executors or administrators may recover the proportion of rent which accrued before his death." Now, there was some reason for the application of the rule to the cases abrogated by this statute. The lessor made a lease for a longer period than he had the power to do; and the sudden termination of it, before the expiration of the term, in agricultural leases, would, in most instances, be very detrimental, if not ruinous, to the tenant. Perhaps, at great labor and expense, he planted and sowed and prepared the land for the harvest, and, by the unexpected termination of his lease, he would have no means of paying the rent. By the death of the tenant for life, the land becomes worse than useless to him; it causes him probably a severe loss. In such a case, it would appear equitable not to have required any rent from him. And yet the legislature has interfered, and declared that he must pay the proportion of rent which accrued before his death. In cases like that now before us, the lessee would not, in the slightest degree, be prejudiced, and no principle of right be violated by the apportionment. The remaindermen would receive benefit from the property from the day on which they became the owners of it; and the representative of the tenant for life, would receive the proceeds of it, to the day in which he had an interest in it. I cannot suppose that the legislature would have changed the rule in the one case, and retained it with all its obnoxious features in the other, if they considered

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that it was still applicable to the latter, or that it had still any vitality. In *Paget v. Gee* (cited in Burns, Justice, *title Distress*), Lord HARDWICKE decided in favor of apportionment in analogy to the statute. The facts were these: tenant in tail leased for years, and died without issue a week before the day of payment of the half year's rent. The lessee, on the day it fell due, paid all the half year's rent to the defendant, who was the remainderman. The executor of the tenant in tail brought this bill for apportionment of the rent. Lord HARDWICKE decided it on two grounds; first, in analogy to the statute; secondly, on the ground that the tenant voluntarily paid the rent, when, in law, he was not obliged to do so. Although, in the latter part of his opinion, he says that he grounds his opinion upon the tenant having submitted to pay the rent, he gives great weight to the first ground. He says, "were it the case of a tenant for years, determinable for lives, he certainly must be included within the act, though it says only tenant for life; it would be playing with words to say otherwise. These cases show the necessity of construing the act beyond the words; as to the equity arising from the statute, I know no better rule than this, *equitas sequitur legem*. Where equity finds a rule of law agreeable to conscience, it pursues the sense of it to analogous cases. If it does so as to maxims of the common law, why not as to the reasons of the acts of Parliament? Nay, it has actually done so in the statute of forcible entry, upon which the court grounds bills, not only to remove the force, but to quiet the possession." He remarks that tenants in tail come expressly within the mischief, and that he would be inclined to extend the act to them.

The money, in the case before us, having been collected and in the hands of one of the parties, the question of its distribution is somewhat similar to that in *Paget v. Gee*. The tenant has nothing to do with the controversy; he cannot be molested by either party; and the court is merely called upon to declare whether one party should have the whole, and the other party no portion of it, although representing the person who owned the land for by the far greater proportion of the period dur-

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ing which the rent accrued. Whatever the rule of equity may be, I think we have a right to apply it in an action of this nature. The only respect in which it differs from *Paget v. Gee*, is that the rent was paid voluntarily, in the latter case, when the tenant was under no legal obligation to pay it. Neither party had a legal right to the whole, nor to any part of it. The recipient of the rent could not be said to have received it for the use or benefit of the representative of the tenant in tail, without supposing that it was a case within the analogy of the statute, and Lord HARDWICKE practically applied the reasoning which I have above copied, to his actual decision. Courts of justice will not interfere to enforce a gratuity, without some semblance of a right, legal or equitable. If, indeed, the tenant had paid the rent to the defendant in that case, with the express direction that a proportion of it should be paid to the representative of the tenant in tail, that would, of itself, be a sufficient foundation for the reason upon which Lord HARDWICKE says he grounds his opinion. Nothing of this kind, however, appears in the case, and, therefore, I say that his reasons must have been, in a measure, founded upon analogy to the statute.

But I am inclined to decide this case upon broader grounds: the inapplicability of the rule contended for to the condition of society here, the fact that it has never been deliberately and expressly recognized, and its obvious hardships and injustice. There is not a particle of reason, founded upon abstract principles of justice, or arising from considerations of convenience or policy, why rents, in cases of this nature, should not be apportioned; and nothing but the pressure of an indubitable current of authority, should constrain us to recognize so anomalous and so technical a rule.

When I add these considerations to the manifest intention of the testator, I have no hesitation in saying that the judgment of the Superior Court of Buffalo should be reversed.

DAVIES and BACON, Js., were also for reversal.

Judgment affirmed.

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The by-laws of a corporation having nine directors, established certain days for regular meetings, and provided that when at such a meeting less than a quorum but three or more directors should be present, they should have power to adjourn to any time prior to the next regular meeting: *Held*, that five directors, or a majority of them, at such an adjourned meeting may exercise the ordinary corporate powers although the absentees have no other notice of the meeting than that with which they are chargeable from the by-law.

APPEAL from the Supreme Court. Action to enforce a liability against the defendant, under the 44th section of the act of 1847, providing for the construction of plank-roads. The trial was before a referee, who found that the defendant became, in 1850, a stockholder of the Moravia Plank-road Company, which became insolvent in September, 1852, and was dissolved in November of that year; and continued such stockholder until the dissolution. The indebtedness, in this case, accrued by the act of the directors in resolving to issue the bonds of the plankroad company to such persons as should be willing to loan to the company the face thereof, not exceeding, in the whole, the sum of \$4,500, and in issuing them. The plaintiff loaned the sum of \$900, and received one of the bonds of the company, duly signed by the officers of the company, and dated on the 21st of November, 1849, on which day the money was placed by the plaintiff in the hands of an agent of the company, who received it on their behalf, and it was expended in building the road.

The meeting, at which the resolution authorizing the issue of bonds was passed, was attended by but five—a quorum—of the directors of the company. There was no evidence that the absent directors had any notice of such meeting otherwise than as they were chargeable with notice from the fact that such meeting was held according to the resolution of a prior meeting which was conceded by the defendant to have been

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regularly held at a date fixed by the by-laws of the company. It did not appear whether all or only a majority of the directors present assented to the resolution.

The referee found that the sum of \$497 remained due upon the bond from the company, and directed judgment against the defendant for \$400, a sum equal to the par value of his stock. The judgment having been affirmed at general term, the defendant appealed to this court.

John K. Porter, for the appellant.

Solomon Giles, for the respondent.

BACON, J. Several objections were taken to the right to recover, in this case, only two of which are of sufficient importance to merit discussion, and they can, in my judgment, be disposed of without difficulty. In the first place it is said that the bond was not valid, because its issue was not authorized at a regular meeting of the Board of Directors. If the directors had power, by vote, to authorize the issuing of the bond in this case, I am not aware of anything in the act permitting their organization, in their articles of association, or in the general statutes of the State, that requires this action to be at what is designated as a regular meeting, nor indicating even what shall be held to be a regular meeting. No such provision of law, or of any statute, has been pointed out. It is stated by the counsel for the defendant, in his points, that the meeting at which the vote was taken, authorizing the issue of the bonds, was irregular, because the regular meeting was on Friday, and this meeting purports to have been held on Monday. It is probable that there is some provision in the by-laws of this plankroad company designating Friday as the regular day of meeting, but these by-laws are not set forth in the Case. An extract, however, is given from them to the effect that whenever, at a regular meeting of the board, there shall less than a quorum attend, and three or more directors are present, those present shall have power to adjourn to such time and place as they

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may deem proper, not passing over the next regular meeting. It is shown, in this case, that a meeting did take place on Friday, the 31st of August, at which three directors were present, and that, on motion, they adjourned over to Monday, the 3d of September following, which is precisely within the terms of the by-laws. At this meeting, on the 3d of September, five directors, being a quorum, were present, and then the resolution was proposed and adopted, which authorized the issuing of the bonds of the company. This is a reasonable by-law, and I can see no fair objection to the proceeding, so far as relates to the formal action of the board. If it was a legal meeting, as I think, beyond question, it was, they had the right to pass any resolution, and take any action which did not violate the law of their organization, or exceed the powers with which, as a corporate body, they were invested.

The next question is whether, conceding the meeting to have been regular, the directors had power, under the resolution they adopted, to borrow the money and issue the bonds upon which the indebtedness of the company accrued to the plaintiff. The referee has found, and such, unquestionably, is the evidence, that the plankroad company, at or about the date of the bond, borrowed and received of the plaintiff the sum of \$900 in cash, and thereupon issued the bond to him; and that this money was borrowed, and was actually used by the company for the purpose of paying for work, labor and materials, employed by them in the construction of their road. This being undisputed, it results, upon principles which, if heretofore doubted, are now well settled in this court, that the company could properly give as evidence of their indebtedness, the security in the form adopted in this case. This was very clearly held in the case of *Barry v. The Merchants' Exchange Company* (1 Sand. Ch., 280). The capital of the company, in that case, was one million of dollars, and after the destruction of their original edifice, they rebuilt it at double that sum, defraying the expense over and above the capital, by loans procured upon their corporate bonds. These were held valid, upon the clearly announced doctrine that a corporation in order to attain

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its legitimate objects, may deal precisely as an individual may, who seeks to accomplish the same ends. "If chartered for the purpose of building a bridge, it may contract a debt for labor, the materials, or the land upon which the bridge is abutted. If more advantageous, it may borrow money to purchase such land or materials, or to pay for such labor, and, as the evidence of the indebtedness, it may execute to the creditors a note, a bond or mortgage, whether the debt be for the money borrowed, or for the work, materials or land."

This case is cited approvingly in *Curtis v. Leavitt* (15 N. Y., 9, 62), and one of the conclusions, among the many others announced in that case, is, that whenever a corporation can lawfully contract a debt for borrowed money, or otherwise, in the course of its business, it can give a time engagement to pay the debt, and such engagement may be in any form which does not come within the prohibition of some particular statute.

This principle is entirely decisive of this case. It has not been claimed, nor will it be pretended, that the form of the security adopted in the case before us, is obnoxious to any such objection, either as being inhibited by the act authorizing the formation of plankroad companies—by virtue of which this Moravia Plankroad Company was organized—or that it comes within the prohibition of any other general statute. Within the above cited case, the money was borrowed of this plaintiff, for the lawful purposes of the plankroad company, and to enable them to perfect and accomplish the very work for which they came into existence; and the evidence shows that it was faithfully applied to that purpose. No rule of law, or morals, would have enabled the company to repudiate that debt, and defeat the collection of the bond, if they had remained solvent; and being a just debt, lawfully created, the liability of the defendant, in this suit, as a stockholder, necessarily attaches to him.

It is suggested, by the counsel of the plaintiff, that the suit can be maintained, and the plaintiff would be entitled to recover, entirely irrespective of the bond—and even conceding the want of power, in the company, to execute any such evidence

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of debt—upon the mere proof of the loan of the money, and its application to the legitimate purposes of the company. This may, perhaps, be conceded, although the complaint is framed upon a different theory, proceeding upon and affirming the validity of the entire transaction of the making of the loan, and the execution and delivery of the bond, as the evidence not only, but the ground work of the indebtedness. But it is not necessary to invoke the aid of any such principle, as, within the doctrine and the authority already cited and referred to, the suit in its present form is sustainable, and the report of the referee is right, both upon the facts and the law. The judgment must be affirmed.

COMSTOCK, Ch. J., and WELLES, J., concurred in this opinion; SELDEN, J., concurred in the result, on the ground that the defendant was liable upon an implied assumpsit, but dissented in respect to its power to issue the bond; DENIO, DAVIES, CLERKE and WRIGHT, J., concurred only in the result without passing upon the validity of the bond. The court, however, concurred in affirming the general power of the directors at the adjourned meeting to exercise the corporate powers.

Judgment affirmed.

PRUYN v. BLACK et al.

In an action against three persons, as partners, one not being served with the summons, nor appearing, the plaintiff is entitled to judgment against the other two, upon evidence that they, alone, constituted the partnership. "Defendants severally liable," in sub. 2, § 136, of the Code, construed as meaning defendants liable separately from the defendants not served, though jointly as respects each other.

APPEAL from the Supreme Court. The action was brought against the appellants and Minor C. Story. The complaint alleged that the three original defendants, on the 1st of Decem-

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ber, 1848, were copartners, doing business under the firm of Black, Wood & Co., and as such copartners were engaged in construction of a certain railroad: that they hired the plaintiff to work for them as a civil engineer upon said railroad, and agreed to pay him ninety-three dollars for each month's work, the same to be paid to him on the first day of each month, during the time he should so work: that the plaintiff commenced working for said defendants, under said agreement, on the first day of December, 1848, and continued working for them, under the same, from that day until the first day of May, 1850, and it was for these services that the action was brought.

The defendants, Wood and Black, appeared and answered the complaint, denying the alleged partnership between the defendants, Wood, Black and Story, or that, as such copartners, they had been engaged in constructing such railroad, as alleged in the complaint. Their answer also denied each and every other allegation in the complaint.

In another separate answer, they set up the defense of *actio non accrevit infra sex annos*; and in another still, that of *non assumpsit infra sex annos*. The defendant, Story, did not answer the complaint, and the Case did not show that the summons was served on him, or that he appeared in the action in any way.

The trial was before a referee, who reported that the defendants, Wood and Black, were copartners on and previously to the first day of December, 1858, engaged in constructing the said railroad, and transacted their business under the style and firm of Black, Wood & Co.; and that they, as such copartners, employed the plaintiff to work for them, as a civil engineer, on said railroad, and agreed to pay him for such services at the rate of twelve hundred dollars a year, payable monthly; that the plaintiff worked for the defendants, Black and Wood, under said agreement, from and including the first day of December, 1848, to the first day of May, 1850. That the plaintiff failed to prove that the defendant, Story, was a member of the firm of Black, Wood & Co., at the time of such agreement or service, as alleged in the complaint. That the defendants, Black

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and Wood, had paid the plaintiff, on account of said service, the sum of seventy-five dollars. The referee found as matter of law:

"1. That the plaintiff, having alleged in his complaint that the sum agreed to be paid him for his said services was the sum of ninety-three dollars for each month's work and services performed by him, cannot recover for such services a greater amount than at and after that rate.

"2. That he is entitled to recover judgment against the several defendants, John Black and John M. Wood, for the amount due him for said services, notwithstanding he has failed to prove that the defendant, Minor C. Story, was liable, as a co-contractor with them, for such services."

The referee further held and decided, that the plaintiff was entitled to recover interest upon the several sums due him at the end of each month, and that there was due to the plaintiff, from the defendants, Black and Wood, after deducting the \$75 paid, the sum \$2,230.43, for which he ordered judgment, and that the complaint should be dismissed, as against the defendant, Story. Judgment was entered according to the report of the referee. The defendants, Wood and Black, duly excepted to the report of the referee, and appealed to the general term; the judgment was affirmed in the first district, on the plaintiff's remitting \$32.08, as of the date of July 25th, 1856; which was accordingly done. The defendants appealed to this court, where the case was submitted on printed arguments.

Richard Goodman, for the appellants.

S. Fairbanks, Jr., for the respondent.

WELLES, J. It was well settled, at common law, that in an action for the breach of a contract, against two or more defendants, a verdict or judgment could not be given against one or more of them, without the others. (1 Chitty Pl., 34, 35, 4 Am. from 3 Lond. ed., and authorities therein cited.) The same doctrine has been uniformly held and acted upon by the courts

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of this State, previous to the enactment of the Code of Procedure. But I think this rule has been changed by the legislature.

Subdivision 2, of section 136 of the Code, provides that where the action is against two or more defendants, and the summons is served on one or more, but not on all of them, if the action be against defendants severally liable, the plaintiff may proceed against the defendants served, in the same manner as if they were the only defendants. The third subdivision of the same section declares, that if all the defendants have been served, judgment may be taken against any or either of them, severally, where the plaintiff would be entitled to judgment against such defendant, or defendants if the action had been against them, or any of them, alone; and by section 274, judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants.

If the defendant, Story, was served with the summons, this case would come precisely within the third subdivision of section 136. If he was not served, which I think we must intend, then I think it is also a case under the second subdivision of that section. The only objection to holding it a case under the second subdivision, arises out of the expression there used: "if the action be against defendants severally liable." The expression "severally liable," when applied to a number of persons, usually implies that each one is liable alone. But when the whole of the section referred to is considered, I think it plain that the intention was to allow a plaintiff to proceed against the defendants served, provided they were liable severally, or in distinction from such as were not served; that the word severally, in that connection, is to be understood as referring to all the defendants served, the same as if they were one person. It cannot, I think, be fairly intended that a plaintiff was to be allowed a larger privilege, in a case where all the defendants were served and where he failed to establish a joint liability against all, than in a case where the defendants, in respect to whom he failed to establish the liability, had not been served with process.

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In the case under consideration, the plaintiff proved a joint liability against the defendants, Black and Wood, who were the only defendants appearing and defending, and failed in establishing any liability against the defendant, Story, who, it does not appear, was brought into court at all. I think, therefore, that the judgment was properly entered against the defendants, Black and Wood.

The referee properly allowed the plaintiff interest on the amount due at the end of each month of the plaintiff's service, from the time it became due. The contract proved and found by the referee, was, that the plaintiff was to be paid monthly; at the expiration of each month the monthly allowance was due and payable, and not being paid, interest was allowable on the several amounts. (*Still v. Hall*, 20 Wend., 51.)

The referee's report is dated July 25th, 1856. He finds due the plaintiff, on that day, \$2,230.43, for which judgment was entered, together with \$252.88, costs. The complaint is dated December 15, 1854. It states that the defendants are indebted to the plaintiff for the work and services mentioned, in the sum of \$1,506, and in the sum of \$487.26 for interest thereon, and demands judgment for the said \$1,506, and interest thereon from the date of the complaint, and said sum of \$487.26.

The appellants complain that the judgment is for too large an amount, and make the following statement:

"The sum demanded,	\$1,506 00
Interest from December 15, 1854, to date of report,	
July 25, 1856, is,	169 67
And a further sum of	487 26
	<hr/>
	\$2,162 93
Amount of report is,	2,230 43
	<hr/>
Error,	\$67 50"

On appeal to the general term, the judgment was affirmed on the plaintiff remitting the sum of \$32.03, as of the date of July 25th, 1856. The plaintiff thereupon remitted the last

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mentioned sum, and perfected judgment in his favor, as a judgment of the date of November 12th, 1856, for \$2,450.52.

It will be seen by a computation, that taking the amount claimed in the complaint, at \$2,162.98, according to the defendant's statement, and the costs before the appeal, \$252.83; \$2,415.76, with interest thereon, from the date of the judgment, to November 12th, 1856, \$50.61, the amount of the judgment finally entered up, is about \$10 less than the amount claimed, with the interest on that sum, and on the costs before the appeal, to November 12th, 1856. The defendants, therefore, have no just ground to complain of the amount.

The objection is, not that the amount found due by the referee is unjust, or greater than the evidence warranted, but that it is more than the demand of judgment would warrant. For the foregoing reasons I think the judgment should be affirmed.

All the judges concurring,

Judgment affirmed.

91	305
118	305
21	305
144	214

PRATT, SURVIVOR, &c., v. THE HUDSON RIVER RAILROAD COMPANY

kkk

Where a proposition for a contract, to be in writing and executed by the parties, has been made by one party and accepted by the other, the terms of the contract being in all respects definitely understood and agreed upon, the party refusing to execute the contract is responsible, it seems, on the breach of his agreement for the same damages as would be recoverable for an entire refusal to perform the contract after its execution in writing. *Per SELDEN, J.; COMSTOCK, Ch. J., WELLES and BACON, Js., concurring.*

An action may be maintained upon the contract as completed, by the offer and acceptance. *Per DENIO, J.*

The complaint counting upon the offer and acceptance, without any reference to the provision for a written contract, the variance is merely formal, and this court will conform the pleadings to the proof to sustain a judgment for the plaintiff. *Per SELDEN, J.; COMSTOCK, Ch. J., WELLES and BACON, Js., concurring.*

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The defendant was a railroad corporation, and its engineer was charged by it with the duty of engrossing the contract and procuring the signature of the contractors, for which no particular time was fixed and no limitation was imposed upon his power: *Held*, that such engineer's consent to a delay of a month in the execution of the written contract was within the authority with which he was clothed by the nature of his employment, and that the defendant could not repudiate the contract on account of such delay, even if unreasonable.

APPEAL from the Supreme Court. The complaint was that on June 20, 1850, the defendant advertised for proposals for grading a portion of its railroad: that the plaintiffs made proposals, in writing, for performing the work and furnishing the requisite materials, at certain prices (which are stated), for the various descriptions of work and materials: that on July 6, 1850, the proposal of the plaintiffs was accepted by the defendant's directors, and notice thereof, and that section number 67 of the road was awarded to the plaintiffs, was delivered to them: that thereupon, with all due diligence, and in a reasonable time, they proceeded to enter upon the performance of the work; purchased horses, cattle, carts, and all other things necessary for the completion thereof, according to the terms, and within the time limited for its performance: that the defendant refused to permit them to perform the work, whereby they lost great gains, &c.

On the trial before a referee, it appeared that the defendant's advertisement for proposals stated that "the contractors, whose bids may be accepted, will be required to enter into contract, and commence the work without delay;" and that the names of all persons to be interested in the contract, must be given in the proposition, as no transfer of bids would be permitted.

The plaintiffs' proposition concluded, "on the acceptance of this proposal, we hereby bind ourselves to enter into written contract, and give the required bond and surety to perform the said work." The referee found that the proposal was made and accepted in contemplation of a written contract and specifications, to be subsequently executed by the parties mutually, a printed copy of which was exhibited, with that view, by the

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defendant, to the plaintiffs, before their proposal was submitted. The contract and specifications annexed were a printed form used by the defendant, equal in length to some sixteen pages of this volume, providing with great particularity and minuteness for every detail of the materials, dimensions, and manner of constructing the work, mode of payment, &c. On July 15, 1850, Pratt, Jr., one of the plaintiffs, called upon Mr. Jarvis, the defendant's resident engineer, whose business it was to attend to the execution of the contract; and one of the printed blanks, prepared for the purpose, was filled up in accordance with the terms of the plaintiff's proposition; was executed by Pratt, Jr., and witnessed by Jarvis. Pratt, Jr., proposed to take the contract with him to a point upon the Ogdensburgh railroad, where his father, the other plaintiff, was, for the purpose of getting the signature of the latter to the contract; he stating that he would return with the contract, executed by his father, within three or four weeks, which, as he said, would be within the time to commence the work. Jarvis assented to his so doing, and Pratt, Jr., took the contract away with him. The referee found that Jarvis had authority to extend the time for the execution of the written contract; that he did so extend it, and that, within the extended time, the contract was executed and tendered to the defendant, who refused to accept the same, or to permit the plaintiffs to perform the work.

On the 5th August, 1850, the defendant's chief engineer made a written certificate that the plaintiffs had omitted to sign the written contract prepared for and delivered to them, and had violated its provisions by making a sub-contract with C. & H. De Graw, without the approbation of the company; wherefore he recommended the defendant's directors to declare the contract abandoned; which was done by resolution passed the next day, and the work let to other parties.

The referee reported in favor of the plaintiffs, for \$2,660, damages, for which, with costs, they had judgment. On appeal the judgment was reversed at general term in the third district. The plaintiffs appealed to this court, stipulating, as required by

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the statute, that judgment absolute should be entered against them, if the order for a new trial should be affirmed.

H. G. Wheaton, for the appellants.

John Thompson, for the respondent.

SELDEN, J. The opinion delivered by the Supreme Court, at general term, shows that the new trial, in this case, was not granted upon any disputed question of fact, but for an erroneous legal inference, drawn by the referee, from facts clearly established. The principal question involved in the case, therefore, is open for the examination of this court.

It is very clear that the plaintiffs did not make out, upon the trial, the precise cause of action stated in their complaint: because that assumes that a contract, by the defendants, to let the work in question to the plaintiffs, was in all respects perfected, and the breach alleged, is, that the defendants refused to permit the plaintiffs to go on with the work. But, as both the advertisement on the part of the company, and the proposition made by the plaintiffs, expressly contemplated that the contract for the work should be reduced to writing and executed by the parties, until that was done, the contract to let the work cannot be said to have been consummated. In the aspect, therefore, in which the plaintiffs have presented their case, they clearly have no claim. The Supreme Court was, no doubt, right in holding that the defendants had never entered into an obligatory contract to let the work upon section 67 to the plaintiffs: because it was an essential part of the agreement between the parties, that the evidence of their contract should not rest in parol, but should be in writing; and this became, therefore, a necessary preliminary to the completion of the contract. Hence the defendants were guilty of no violation of contract, in refusing to permit the plaintiffs to do the work.

It does not follow, however, from this, that no contract was made which was binding upon the defendants. A contract to make and execute a certain written agreement, the terms of

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which are specific, and mutually understood, is, in all respects, as valid and obligatory, where no statutory objection interposes, as the written contract itself would be, if executed. If, therefore, it should appear, from the evidence, that the minds of the parties had met; that a proposition for a contract had been made by one party and accepted by the other; that the terms of this contract, were, in all respects, definitely understood and agreed upon, and that a part of the mutual understanding, was, that a written contract, embodying those terms, should be drawn and executed by the respective parties, this is an obligatory contract, which neither party is at liberty to refuse to perform.

Such a case cannot be distinguished from that of an agreement to execute a lease. If two parties negotiate for a lease of certain premises, and they agree upon the terms and conditions of the lease, and that a written lease shall be drawn and executed, embracing those terms, this is not a lease, but it is a contract, which, whenever the statute of frauds does not interfere to prevent, can be enforced; and which the courts will compel the parties specifically to perform. The books are full of such cases, and it can hardly be necessary to refer to them at length. It is required, in such cases, that the preliminary agreement to execute the lease, should, itself, be in writing; but this is merely to avoid the effect of the statute of frauds. Wherever there is anything to take the case out of the operation of the statute, the agreement, although by parol, will be enforced.

Thus, it is said in *Seagood v. Meale* (Prec. in Ch., 560), "So, where a man, on promise of a lease to be made to him, lays out money in improvements, he shall oblige the lessor afterwards to execute the lease;" the laying out of money in improvements being held, in such a case, to prevent the operation of the statute. The cases of *Powell v. Dillon* (2 Ball & Beatty, 416), and *Verlander v. Codd* (1 Turn. & Russ., 352), are cases where the agreements to execute the lease were by parol, but there was a brief note in each case, signed by the lessor, which the courts held sufficient to take the cases out of the statute. These, it is true, were bills in Chancery, to compel a specific

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performance; but the case of *Shippey v. Derrison* (5 Esp., 190), which was sustained, was an action on the case to recover damages for a refusal, by the tenant, to take a lease, pursuant to a preliminary contract to that effect.

To determine whether what was done in this case, amounted to an agreement by both parties to enter into a written contract, upon certain definite terms, it will be necessary to recapitulate, with some precision, the evidence in the case. On the 19th of June, 1850, the defendants inserted in the newspapers of the day, an advertisement inviting proposals for doing the grading upon certain sections of their road, including number 67, and containing the following clauses: "Contractors, whose bids may be accepted, will be required to *enter into contract*, and commence the work without delay." This was signed by the chief engineer of the company.

The plaintiffs, pursuant to this invitation, delivered to the defendants, on or about the 1st of July, 1850, a written proposition for section 67, among others, embracing a table minutely specifying the various kinds of work, and the prices for each, and containing the following clause: "On the acceptance of this proposal for all or either of the said sections, we hereby bind ourselves to *enter into written contracts*, and give the required bond and surety, to perform the said work for the consideration above mentioned."

On the 6th of July, 1850, the defendants gave notice to the plaintiffs, that they accepted their proposition for number 67, and that they were required to come and execute the contracts immediately. On the 15th of the same month, Frederick Pratt, Jr., one of the plaintiffs, called upon Mr. Jarvis, the resident engineer, whose business it was to attend to the execution of the contract. Mr. Jarvis thereupon took printed blanks, prepared for the purpose by the company, and filled them up for section No. 67, pursuant to the terms of the proposition which had been accepted; and these contracts were signed by the plaintiff, Frederick Pratt, Jr., and witnessed by Mr. Jarvis. They were then taken by Frederick Pratt, Jr., by arrangement with

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Mr. Jarvis, for the purpose of procuring the signature of the other plaintiff.

Now the question is, whether the inevitable inference from these facts, is not that the defendants impliedly undertook, to execute, on their part, the agreement thus prepared by their engineer. This question, as it seems to me, admits of but one answer. I cannot doubt that if the plaintiffs had both been present when the contract was drawn, and had both affixed their signatures to the writing, as prepared by him, the defendants would have been bound to execute, on their part, and liable to an action if they refused.

Indeed, the defendants' counsel does not deny that an action will lie for refusing to enter into a written contract, under such circumstances; but he insists that the defendants were justified in their refusal to execute, first, by the delay on the part of the plaintiffs in returning the contract duly executed by them: And secondly, by the violation, by the plaintiffs, of the provision in the agreement against sub-letting the work.

In regard to the first of these grounds, the referee found that the engineer, Jarvis, had authority to extend the time for the execution of the contract by the plaintiffs; that he did so extend it; and that the contract was duly executed by the plaintiffs, and tendered to the defendants within such extended time. The Supreme Court overruled the conclusion of the referee, as to the authority of Jarvis, which was a mere legal inference from his position and employment, but did not disturb his finding, upon the question of fact, as to the actual extension of time, and the execution and return of the contract within the time thus granted.

The question upon this point then is, whether Jarvis had authority to extend the time. He was the resident engineer upon that part of the defendants' road which embraced section 67, to which the plaintiffs' contract related, and was charged, according to the testimony of the chief engineer, Young, with making out the contracts, and procuring the signatures of the contractors. No precise time was fixed for the execution of this contract. Under such circumstances, it is doubtful whether

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either party could take advantage of the lapse of time, without first calling upon the other to execute, or giving some notice that the contract, if not executed by a given time, would be abandoned.

But, however this may be, when the agent employed for the express purpose of procuring the signature of one of the parties, consents to a delay, such party is, I think, justified in acting upon such consent. If the time for the execution was fixed by the contract, the agent would have no right to enlarge it. But where no time is fixed, nor any limitation imposed upon his powers, he is necessarily clothed with a discretion as to the time. The power is incident to the duty he has to perform. It will hardly be contended that he could not, for his own convenience, or the convenience of the other party, postpone the execution for a day, or appoint some day which would be mutually convenient for the purpose.

It may be said that the law requires the party to execute within a reasonable time, and that although the agent may postpone within this limit, he cannot go beyond it. But the power of the agent cannot depend upon the reasonableness of its exercise. If he has a discretionary power to postpone for a day, there clearly can be no limit to this discretion, so long as it is exercised in good faith. My conclusion, therefore, is, that the engineer, Jarvis, in consenting that one of the plaintiffs might take the contract, for the purpose of procuring the signature of the other, and return it within the time named, did not exceed the authority with which he was clothed by the very nature of his employment.

The second ground upon which the counsel contends that the defendants were warranted in refusing to execute the contract, is, that the plaintiffs had sub-let the work upon section 67, to the De Graws, contrary to an express provision of the written contract, upon which they insist. It is perhaps a sufficient answer to this position, to say, that the referee has not found the facts upon which it purports to rest. If, however, this court should look into the evidence on that subject, it would not find the fact of sub-letting established. The proof goes no

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further than to show that some writing was executed between the plaintiffs and the De Graws, on or about the 15th of July, 1850, but the writing was not produced, nor were its contents proved. The certificate of the chief engineer, upon which the resolution of the board of directors, abrogating the contract with the plaintiffs, was based, was entirely without force. That provision of the contract which authorized the engineer to certify to the directors any delinquency on the part of the contractors, could not take effect until the contract itself was executed, so as to become obligatory upon the parties; which, as we have seen, was never done. On neither of the grounds taken by the defendants, therefore, were they justified in abrogating or refusing to execute the written agreement.

But it may be said, that a claim for damages, for refusing to enter into the contract, is a different cause of action from that set up in the complaint, and hence the plaintiffs cannot recover without an amendment, which it is now too late to make. This is, no doubt, a case, where, prior to the Code, the plaintiffs would have been put to the delay and expense of a new action, notwithstanding the whole merits of the case had been tried in the pending suit. A prominent object of the reforms introduced by the Code, was, to prevent parties from being driven to the necessity of prosecuting a second action, upon a mere question of form. Section 173 of the Code provides that "the court may, before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process, or proceeding, by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect: Or by inserting other allegations material to the case: Or where the amendment does not change, substantially, the claim or defence, by conforming the pleading, or proceeding, to the facts proved."

Under this section, it was held in the case of *Bate v. Graham* (1 Kern., 237), that where the complaint omitted to aver a necessary fact, which fact appeared from the answer, the defect might be supplied by amendment, even after appeal to this court, notwithstanding in that case an objection had been taken

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at the trial, on account of the omission, and overruled. The power of this court to amend, in furtherance of justice, being thus established, a stronger case than the present, for the exercise of the power, could scarcely be presented. The cause of action stated in the complaint, and that established upon the trial, are substantially the same. If the defendants' counsel was right in the position that the measure of damages would be different in the two cases, this would be a conclusive objection to the amendment. But it is obvious that it could make no difference in the damages, whether the defendant refused to sign the contract, or first signed, and then refused to permit it to be executed. The loss to the plaintiffs must be the same in either case. The difference, therefore, between the complaint as it is, and as it should be, being merely formal, and not affecting, in any degree, the merits of the case, the pleadings should, I think, be conformed, pursuant to the Code, to the facts proved. (See also *Lounsbury v. Purdy*, 18 N. Y., 515.)

The defendants have no reason to complain of the rule of damages adopted by the referee, it being quite as favorable to them as the law and facts of the case would warrant. The judgment, at general term, should be reversed, and that of the special term affirmed.

COMSTOCK, Ch. J., WELLES and BACON, Js., concurred; DENIO, J., concurred in the result on the ground that there was a valid contract for the performance of the work; DAVIES, CLERKE and WRIGHT, Js., were for affirmance.

Judgment at general term reversed, and that on referee's report affirmed.

Church v. Brown.

L. V. & E. T. CHURCH v. BROWN.

21	315
118	535
21	315
123	299
21	315
126	298

A written undertaking to be responsible "for all such goods as W should buy of C," indorsed upon, and executed at the same time with, a contract between W and C for the purchase and sale of the goods, contains a sufficient expression of the consideration to be valid under the statute of frauds.

The guaranty, without reference to the contract on which it is indorsed, discloses that the consideration is the delivery of the goods at the request of the guarantor: such request is in effect stated in the engagement to be responsible for goods to be delivered to another.

This case distinguished from *Brewster v. Silence* (4 Seld., 210), and the latter reviewed and disapproved by COMSTOCK, Ch. J.

APPEAL from the Supreme Court. Action upon a written guaranty. The referee, before whom the cause was tried, found these facts: The plaintiffs, on the 1st day of July, 1852, made a contract with one White, which was reduced to writing and signed by the parties, by which the plaintiffs agreed, during one year, to sell to White such articles of hardware, from their store, as he might desire, upon a credit of one year, with interest after six months from the time of purchase. Simultaneously with the execution of this agreement the defendant subscribed this instrument indorsed upon the agreement: "I will be responsible for all such goods as Mr. White shall buy of the Messrs. Church, within one year from date, and which shall not be paid for according to the terms of the within contract. July 1, 1852." The referee decided that the promise of the defendant was a promise to answer for the debt, default or miscarriage of another, and void, because no consideration was expressed therein. He ordered judgment for the defendant, which, having been affirmed at general term in the seventh district, the plaintiff appealed to this court. The case was submitted on printed arguments.

Campbell & McMaster, for the appellants.

Morris Brown, respondent, in person.

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WRIGHT, J. The statute requires every special promise to answer for the debt, default, or miscarriage of another, to be in writing, subscribed by the party to be charged thereby, and expressing therein the consideration. The consideration and promise must be expressed in the instrument, or the agreement is void (2 R. S., 135). The referee held, in this case, that the agreement of the defendant was void, because no consideration was expressed therein, as required by the statute; and this is the single point for review.

Neither the English statute of frauds, nor ours, prior to the Revised Statutes, in terms, required the consideration to be expressed in an agreement to answer for the debt or default of another; but the courts had held, before the verbal change of the statute in this respect, that the consideration and promise must both be expressed in the writing. (*Sears v. Brink*, 3 John., 210; *Douglass v. Howland*, 24 Wend., 35.) The Revised Statutes, therefore, added nothing but what had been judicially determined as necessary to fulfill the requirements of this noted statute, as it was originally adopted in England, and in this State. I know of no case, in the courts of this State, before or since the Revised Statutes, holding that where, from the whole instrument, the consideration does not expressly, or by necessary inference, appear, the omission may be supplied by parol proof, and the statute satisfied in that way. An undertaking to answer for another, is unquestionably within the statute unless the consideration be expressed in the instrument subscribed by the promisor. But how expressed? Certainly it has never been deemed absolutely necessary that any particular form of words should be used in expressing the consideration. It has been held, often, that a seal expresses the consideration within the meaning of the statute. The same rules of construction are applicable to collateral, as to original undertakings, in implying or inferring the consideration from the terms of the instrument. It is enough, said PRATT, J., in delivering the opinion of the court in the *Union Bank v. Coster's Executors* (3 Comst., 203), if, from the whole instrument the consideration expressly, or by necessary inference, appears

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so that it be clear that such, and no other, was the consideration upon which the promise was made. (*Douglass v. Howland*, 24 Wend., 85; *Allen v. Jaquish*, 21 Wend., 628.) To hold, at this late day, that, for the purpose of satisfying the statute, a particular form of words, expressive of the consideration, must be written in a guaranty, would be to overthrow a series of decisions extending through the last half century. In *Stadt v. Lill* (9 East., 348), the written guaranty was in these words: "I guarantie the payment of any goods which I. Stadt delivers to I. Nicholla." It was objected that there was no consideration stated for the promise. But Lord ELLENBOROUGH held that the stipulated delivery of the goods to Nicholls, was a consideration, appearing on the face of the writing, and when the delivery took place, the consideration attached. In *Bailey v. Freeman* (11 John. R., 221), the defendant signed a guaranty attached to the agreement of one Blanche, to deliver merchandise to the plaintiff, in these words: "I do hereby guaranty the performance of the above agreement, and every part thereof, on the part of N. Blanche, to be performed at the time, and to the amount therein mentioned." It was urged that the guaranty was void for not expressing a consideration, but the court said that the guaranty was part of an entire contract, consisting of the agreement signed by Blanche, and the guaranty signed by the defendant, and, that as a consideration was apparent on the face of the original agreement, the agreement was good. In *Rogers v. Kneeland* (10 Wend., 219), it appeared that L. Morgan & Sons wrote to N. Rogers & Sons, requesting them to indemnify Kneeland against damages and costs, in a litigation which Kneeland was conducting for the benefit of the Morgans. Rogers & Sons indorsed upon this letter, and signed the following promise: "We will promptly comply with the request of L. Morgan & Sons, as contained in the within order." The objection that there was no consideration expressed in it, was overruled. The judgment of the Supreme Court was unanimously affirmed in the Court of Errors (13 Wend., 115), WALWORTH, Chancellor, delivering the opinion of the court, in which he said, "there is sufficient consideration on the face of

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this agreement, to take it out of the statute of frauds, if, from the terms of the whole agreement (the letter and guaranty), thus taken together, a sufficient consideration for the collateral promise or guaranty appears, it is sufficient." In *Marquand v. Hipper* (12 Wend., 520), the guaranty was in these words: "I do guaranty and agree to become security for the amount of any value, in silver or money, not exceeding \$400, that Marquand & Brother, may, from time to time, for the ensuing two years, put into the hands of I. I. M., for the purpose of manufacturing into work, and that, upon such deficiency being proved, if said M. refuses to pay, that I will assume to pay the same, with interest on the amount from time due." The court said: "The consideration sufficiently appears on the face of the instrument; it is the putting into the hands of M., by the plaintiff, of any amount of silver, not exceeding \$400, for the purpose of being manufactured by him." In *Staats v. Howlett* (4 Denio, 559), the guaranty was as follows: "To B. P. Staats—I hereby obligate myself to hold you harmless for any indorsement you may make for, or have made for the late firm of P. H. & F., not exceeding \$5,000." The court held that the consideration was expressed, so far as related to future indorsements. In *Union Bank v. Coster's Executors* (3 Comst., 203), Hechscher & Coster, merchants in New York, sent to Kohn, Darrow & Co., in New Orleans, a letter of credit as follows: "Sirs—We hereby agree to accept and pay, at maturity, any draft or drafts on us, at sixty days' sight, issued by Kohn, Darrow & Co., of your city, to the extent of \$25,000, and negotiated through your bank." At the foot of this was the following guaranty, signed by John G. Coster: "I hereby guaranty the due acceptance and payment of any draft or drafts issued in pursuance of the above credit." The court held that, construing the two instruments together as one instrument, the consideration for the guaranty was sufficiently expressed. In *Gates v. McKee* (3 Kern., 232), the guaranty was as follows: "Mr. Gates—Sir:—I will be responsible for what stock Mr. E. McKee has had, or may want hereafter, to the amount of \$500." It was held that the instrument expressed the con-

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sideration within the requirements of the statute. In truth, the principle runs through all the cases that these contracts of guaranty are to be construed by the same rules as original undertakings, with the exception that the consideration must appear on the face of the writing; whereas in original contracts it may be shown by parol. A reasonable construction is to be given to the instrument, and if, from the terms of it, the consideration for the promise is necessarily inferable, it is expressed in it within the meaning of the statute. Of the cases above cited, in no single one was the consideration expressly stated in the writing, but in each and all of them was apparent, by a reasonable construction of the terms or language of the instrument. Another rule, also, is applicable to this class of contracts, viz.: the construing together, as one instrument, two or more instruments given at the same time, and relating to the same subject matter. This rule was applied in *Rogers v. Kneeland* (13 Wend., 115), and in *Union Bank v. Coster's Executors* (3 Comst., 203). In the former case, Chancellor WALWORTH said: "When the guaranty, or promise to pay the debt of another, is made at the same time with the agreement to which it is collateral, and is indorsed thereon, and refers thereto, the whole is to be taken together as an entire agreement, for the purpose of ascertaining whether it is a valid agreement within the provisions of the statute. And if, from the terms of the whole agreement thus taken together, a sufficient consideration for the collateral promise or guaranty appears, it is sufficient." In the latter case, PRATT, J., uses this language: "When a guaranty is given at the same time with the principal contract, and forms a part of the entire transaction, if the consideration be stated in the principal contract, though none be stated in the guaranty, it will suffice."

Now, if the cases cited, and especially that of the *Union Bank v. Coster's Executors*, which arose long subsequent to the Revised Statutes, are to be followed as authority, the referee clearly erred in holding that there was no consideration expressed in the defendant's guaranty, as required by statute. The present case cannot be distinguished from that of the *Union*

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Bank v. Coster's Executors; the controlling principle of which decision was necessarily involved, and reaffirmed and approved in *Gates v. McKee* (3 Kern., 232). On the 1st of July, 1852, the plaintiffs entered into an agreement with Thomas White, to sell to the latter, from their store, such articles of goods, in the hardware line, as he might want, on a credit of one year; interest to be charged thereon after six months from the time of purchase. In case, at any time after the expiration of one year from the date of the contract, the plaintiffs desired to close up the contract, they were to give White one month's notice of such intention, and, for the balance of the account, they might hold against him unpaid, according to the terms of the contract, they agreed to take good responsible notes, due in six months from the time of notification. Simultaneously with the execution of this agreement, the defendant indorsed upon it the following guaranty: "I will be responsible for all such goods as Mr. White shall buy of the Messrs. Church, within one year from date, and which shall not be paid for according to the terms of the within contract. July 1, 1852 (signed), M. Brown." Now, construing these instruments together as one, the consideration plainly appears on the face of the writing. It is the sale and delivery, by the plaintiffs, to White, of such goods as the latter might want from their store, for one year from the date of the agreement. Paraphrased, the contract would fairly read in this way: "In consideration that you, the Messrs. Church, sell and deliver to Thomas White, from your store, such articles of goods, in the hardware line, as he may want, on a credit of one year, interest to be charged thereon after six months from the time of purchase, I, Morris Brown, will be responsible for all such goods as White shall buy within one year, and which shall not be paid for according to the terms of the contract." The case is a plainer one than that of the *Union Bank v. Coster's Executors*, as parol evidence was not required to show that the original and collateral contract related to the same subject matter, or to aid the court in giving a true construction to any ambiguous terms in the agreement, as there were none. It seems a clear case, in which the

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consideration is manifest, and is sufficiently expressed to satisfy the requirements of the statute in the instrument of guaranty, and the agreement on which it was indorsed and to which it referred. The remarks of BRONSON, J., in *Staats v. Howlett* (4 Denio, 559), may well be applied to it, that "if this contract should be held void (on the ground that the consideration was not expressed), it would overthrow most of the guarantees and letters of credit which now enter so largely into the commercial world."

There is a class of cases in the books, in respect to guarantees of payment indorsed or written on promissory notes, that has not escaped observation. In regard to these, there is much confusion, or, at least, was, until the decision in *Brewster v. Silence* (4 Seld., 207). In the earlier cases, where a person signed a guaranty of payment indorsed on a promissory note, and who was privy to the original consideration of the note, and signed the indorsement contemporaneously with the making of the note, it was held that he might be treated as a joint and several promisor with the party signing on the face of the note. (*Hough v. Gray*, 19 Wend., 202; *Lequeer v. Prosser*, 1 Hill, 256.) In other cases he was held to be an indorser. (*Prosser v. Lequeer*, 4 Hill, 422; *Leggett v. Raymond*, 6 Hill, 639.) It is worthy of remark, that in the case of *Lequeer v. Prosser*, the words, "for value received," were in the written guaranty, which, it is said in *Brewster v. Silence*, would have sufficed as an expression of the consideration. In *Manrow v. Durham* (8 Hill, 584), it was proved, by parol, that C. P. Durham purchased a horse of the plaintiff, and, in part payment therefor, transferred to him a note of Ephraim Durham, of which he was the payee, on the back of which was indorsed the following guaranty, upon which the suit was brought: "We guaranty the payment of the within note." This was signed by C. P. Durham and one Moulthrop, who was proved, by parol, to have signed it at C. P. Durham's request, and as his surety. The Supreme Court held that the writing was, in substance and legal effect, a promissory note, and, as such, it imported *prima facie* to be founded upon a valuable considera-

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tion. The judgment of the Supreme Court was affirmed in this court, not on the ground that the instrument amounted to a promissory note or general indorsement, but on the ground that undertaking was for the payment of the debt of one of the guarantors, and, therefore, original, and not reached by the statute. This case follows that of *Brown v. Curtis* (2 Comst., 225), where it was held that where the payee and holder of a promissory note transferred it to his creditor, to pay his own debt, and, at the same time, executed on the back of the note transferred a guaranty of the payment thereof, that such guaranty was not within the statute of frauds, and was valid, although it expressed no consideration; it being, though in form, a promise to answer for the debt of another, in substance, an engagement to pay the guarantor's own debt, in a particular way, and would be good without any writing. It may be observed that the statute of frauds was not made a point in any of the cases cited above, as decided in our own State, in which the guarantor was held to be a joint maker of the note guaranteed, or an indorser, or the maker of a new note, until the case of *Manrow v. Durham*. In that case (the guaranty having been executed after the making of the note), three of the judges in this court were of the opinion that it was a collateral undertaking, and no consideration being expressed, it was void by the statute of frauds.

The case of *Hall v. Farmer* (5 Denio, 484), was an action brought on a guaranty of payment, indorsed on a promissory note. It was shown by parol, that the makers of the note, and the plaintiff, adjusted and settled their respective demands against each other, at the date of the note, finding due to the plaintiff the amount mentioned in it. The defendants were not present at the settlement. After the balance was ascertained, the note and guaranty were made; the defendants signed the latter in this form: "We, the undersigned, guaranty the payment of the within." It was claimed, in the Supreme Court, that the defendants were liable as makers of a promissory note, but the court held that it was not, itself, a promissory note, but was a special promise to answer for the

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debt or default of another, within the language and spirit of the statute of frauds, and, to be valid, must express the consideration on which it was made. This case was affirmed in this court by a vote of four to three; one of the majority placing his concurrence on the ground that the contract of the defendants was upheld by no consideration in fact. He thought that a collateral promise, by a third party, to pay a pre-existing debt, for which he was in no wise liable, and where no new credit was given, could not be sustained without some other consideration, which did not appear in the case. The decision settled no general principle. That the defendants were neither makers nor indorsers of a promissory note, but that their contract was one of guaranty, had been settled before. (*Spies v. Gilmore*, 1 Comst., 321; *Brown v. Curtis*, 2 Comst., 225.)

The case of *Brewster v. Silence* (4 Seld., 207), was an action on a guaranty, written beneath a promissory note, in this form: "I hereby guarantee the payment of the above note (signed), F. Silence." It was shown, by parol, that on the 18th of April, 1848, George Silence purchased a pair of horses of one Thompson, and that a condition of the sale, was, that the note to be given for them should be guaranteed by the defendant, and the sale was not to be consummated until after the execution of the guaranty. George Silence made and executed a note for \$140, payable to the order of Thompson, at the Rochester City Bank, by the 1st of November, following, and the defendant signed the guaranty at the same time. After the execution of the note and guaranty, the horses were delivered by Thompson to George Silence, who at the same time delivered the note and guaranty to Thompson. The court held that a guaranty, written beneath the promissory note of a third person, and delivered with it upon a previous agreement, is not a part of the note, and the guarantor is not a joint maker with the maker of the note; but it is a distinct contract to answer for the debt of a third person, and must be in writing and express the consideration upon which it is made, or it will be void; that such consideration cannot be supplied by parol proof; accordingly, it was held that the action could not be sustained

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upon the guaranty. It is not perceived, however, that the court decided anything new, except possibly overthrowing a class of cases holding that a guaranty made at the same time with the principal contract, and constituting an essential ground of the credit given to the principal debtor, requires no other consideration than that which upholds the principal contract, and that the consideration need not be expressed in the written guaranty, but may be shown by parol evidence. It had been held before, that similar contracts of guaranty could not be construed to mean something else than what the language of the instrument plainly imports, with the view of giving effect to the supposed intention of the parties, as ascertained from extrinsic evidence; that in form it was a promise to answer for the debt or default of another, and is to be so construed and treated, unless it be shown, by parol proof, that in substance it was an undertaking, by the guarantor, for his own benefit, and upon a full consideration received by himself. (*Brown v. Curtis*, 2 Comst., 225.) Being a promise to answer for the debt or default of another, and nothing else, the consideration could not be shown by parol, but must be expressed in the instrument to make it valid. All that the case decides, is, that an undertaking, in form and substance collateral, though executed simultaneously with the promissory note on which it is written, is invalid if the consideration be not expressed therein; and, although there may be a good consideration for the special promise, it cannot be shown by parol evidence in an action on the guaranty. It is said that the case, in its facts and principles, is just like that of the *Union Bank v. Coster's Executors*, and the one under consideration. This is not so, but it is plainly distinguishable. There was nothing in the instrument of guaranty expressing the consideration, or no terms or language from which it might be legally inferred, nor, if the note and guaranty were taken and construed together as one instrument, would any consideration for the guaranty appear on the face of the writing. Neither the consideration for the original nor collateral undertaking appears. The original was a mere promise to pay money, and although the words "value receiv-

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ed " imported a consideration sufficient to uphold that promise, yet it could be shown, by parol, that there was no consideration in fact to sustain it. But conceding that the consideration for the note sufficiently appears in the instrument, and the note is to be treated as the debt of the maker, the guaranty is of an existing debt, and not of a debt to be contracted upon the credit of the guaranty. The consideration for the guaranty is a past, and not a future consideration. A consideration that will support a contract of guaranty, must consist in some benefit to the promisor, or some other person at his request, or some detriment to the promisee. It cannot be pretended that the guarantor of an existing debt of a third person, is, himself, to be benefited by the guaranty. It is nothing but an undertaking, on a past consideration, for the benefit of another. A past consideration, unless done at the request of the promisor, is not sufficient to support any promise. Regarding the note as the existing debt of George Silence, and the defendant as the guarantor for the payment of it, the promise of the latter would have a past consideration, only, to support it; and, to make that sufficient, the guaranty must have been made at the guarantor's own request. So that construing a promissory note, or any contract for the payment of an existing debt, with the instrument of guaranty, instead of being able to imply or infer from the terms and language of the instruments taken together, a consideration for the guaranty, no binding contract of guaranty even could be inferred; and herein lies the plain distinction between this case and that of the *Union Bank v. Coster's Executors*, and other cases cited, where the guaranty was of a debt to be contracted on the credit of the guaranty, and the consideration a future one. In the latter cases the promise is to do an act in consideration of some act to be done by the promisee, which implies a request. In the case under consideration, for example, the promise was, to be responsible for goods that White should buy from the plaintiffs, in consideration that the plaintiffs would sell and deliver to White such goods as he might want, on a credit of one year. The promise implied a request to furnish the goods to White, and

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a compliance, on the part of the plaintiffs, closed the contract and made it binding. Although it was necessary to show performance by the promisor, by parol evidence, yet, as was said in the *Union Bank v. Coster's Executors*: "Such evidence is no violation of the statute requiring the consideration to be in writing. The consideration of the promise is expressed, and the parol evidence is only used to show, not what the consideration is, but that the act which constitutes that consideration has been performed."

The case of *Brewster v. Silence*, therefore, is neither in its facts nor principles just like the case of the *Union Bank v. Coster's Executors*, and kindred cases. In the one case, the guaranty was of an existing debt; in the other, of a debt to be contracted on the credit of the guaranty. One had a past consideration to support the promise, which was none at all; in the other, the promise was supported by an act to be done by the promisee at the implied request of the promisor. In the one, there was no consideration moving between the promisor and promisee; there was none in fact, and none could be legally implied. The note and instrument of guaranty, taken together, showed no valid contract of guaranty, and, therefore, by no rule of construction could the writing be held to express a consideration; in the other the act to be done by the promisee, at the request of the promisor, and which was the consideration of the promise of the latter, was expressed in the writing. In the one, the only consideration that could support the promise, was one of benefit to the promisor, and this must have been expressly stated, and by no rule of construction applicable to this class of contracts, could be inferred; in the other, the promise rested upon some act to be performed in the future by the promisee, at the request of the promisor; the thing to be done by the promisee, was the consideration for the promisor. Nor does the case show an intention to overrule or interfere with that of the *Union Bank v. Coster's Executors*, or the principles that controlled the judgment in that case. Nothing is evinced showing that the court intended to overrule the principle that where the guaranty is of a debt to be contracted on the credit

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of the guaranty, and the consideration of the guarantor's promise, is something to be done by the promisee, at his request; the promise and consideration for it being stated in the writing, the latter is sufficiently expressed to satisfy the requirements of the statute. The case of the *Union Bank v. Coster's Executors* is not, nor is any other case upon that class of guaranties having a future consideration to support the promise, even cited or alluded to by the judge who delivered the opinion of the court. Three of the judges who took part in, and sustained the decision in *Brewster v. Silence*, had agreed to the judgment in the *Union Bank v. Coster's Executors*, although two of them in *Durham v. Munrow*, and *Hall v. Farmer*, were of the opinion that the guaranties in those cases of an existing debt, were void, for the reason that no consideration for the promise was stated, appeared, or was expressed on the face of the writing. In *Gates v. McKee*, which was decided in December, 1855, without any dissenting vote, and turning necessarily on the question involved in the present case, as the point was distinctly taken that the instrument did not express the consideration, two of the judges who were of the majority in *Brewster v. Silence*, took part in the decision, and, although such decision was put on the authority of the *Union Bank v. Coster's Executors*, expressed no dissent. In fact, there is no ground for saying that the case of *Brewster v. Silence* is in direct conflict with that of the *Union Bank v. Coster's Executors*, or that it was intended to, or overrules the latter case. The cases are clearly distinguishable; but if it were otherwise, the former must yield to the latter. To hold that all judicial powers of construction are paralyzed, when coming to an agreement depending on the statute of frauds, and that the requirements of the statute are not satisfied, in any case, unless the promisor has set forth in the writing, particularly, the reasons which induced him to enter into the contract, would be, especially since the case of the *Union Bank v. Coster's Executors*, to inflict infinite mischief upon the commercial public. Securities, doubtless, since that case, to an immense amount have been taken in business throughout the State, in reliance upon the idea that the doctrines affirmed by it might be regarded as settled.

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The present case is in line, and cannot be distinguished from the case of the *Union Bank v. Coster's Executors*. The defendant cannot escape the effect of his promise, on the ground that the consideration for such promise was not sufficiently expressed.

The judgment of the Supreme Court should be reversed, and a new trial ordered, with costs to abide the event.

DENIO, SELDEN and CLERKE, Js., concurred.

COMSTOCK, Ch. J. According to the contract between the plaintiffs and White, they were to sell to him goods, from time to time, and he was to pay them therefor at the expiration of the specified period of credit. On the back of that writing, the defendant signed an agreement, of the same date, declaring that he would "be responsible for all such goods as White should buy of the Messrs. Church (the plaintiffs), within one year from the date, and which shall not be paid for according to the within contract." These two instruments were made up at the same time, and the one which the defendant signed, expressly refers to the other. It is a direct and irresistible inference from the writings themselves, that the undertaking of the defendant was the foundation of the credit on which the goods were to be sold and delivered to White. The sale and delivery of those goods, was, therefore, the consideration of the defendant's agreement. This conclusion is perfectly plain on the face of the instrument. No extrinsic proof is required, nor is it even necessary, for this purpose, to turn the paper over and look at the other side. There is no occasion to consult the principal contract, except to ascertain the term of credit. The collateral writing, itself, discloses the consideration on which it was given, to be the prospective sale of goods to another person. That this is sufficient within the statute of frauds, is certainly plain in principle, and it is moreover as well settled by authority as any legal proposition can be. (*Bailey v. Freeman*, 11 Johna., 221; *Rogers v. Kneeland*, 10 Wend., 219; *S. C.* in error, 13 *Id.*, 115; *Marquand v. Hipper*, 12 Wend., 520; *Whitney v. Groot*,

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24 *Id.*, 82; *Walrath v. Thompson*, 4 Hill, 200; *Fellows v. Prentiss*, 3 Denio, 512; *Staats v. Howlett*, 4 *Id.*, 559; *Union Bank v. Coster's Executors*, 8 Comst., 203; *Gates v. Mc Kee*, 3 Kern., 282.) An undertaking, by one person, to be responsible for goods to be delivered to another, is, in effect, a request to deliver the goods. It is, in law, no more and no less than a letter of credit, general or particular, according as it may or may not have a particular address; and, if we hold such undertakings, when in writing, to be invalid, for want of a consideration expressed, we strike at a vast number of the commercial guarantees which are used in the dealings of mankind. The principle on which these guarantees rest, is simple and elementary. It is this: A promise to do an act, in consideration of an act to be done by the promisee, implies a request that the promisee, on his part, shall perform the act specified. If the promisor is to receive the direct benefit of the thing to be done, then the undertaking is original, and need not be in writing. If another person receives the benefit, and becomes originally liable, then the undertaking is collateral, and must be in writing. But in either case, the consideration is the performance of the act on the request of the promisor (*Union Bank v. Coster's Executors*, *supra*), and, as I have said, an agreement to pay for goods to be delivered, plainly imports a request that they shall be delivered.

The Supreme Court pronounced the judgment under review, upon the supposed authority of *Brewster v. Silence* (4 Seld., 210), as the latest decision of this court affecting the question. We followed that case in the very recent one of *Draper v. Snow* (20 N. Y., 831), but, in so doing, it is proper to say that some of the members of this court, finding that no distinction between the two cases existed, did not examine the principles involved, or the antecedent authorities. The present case has led me to that examination, and I am so well satisfied that we were in error that I feel myself bound to say so. In *Brewster v. Silence*, the guarantee sued upon was written at the foot of a promissory note, and it was executed and delivered at the same time with the note. The instrument was held to be void

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under the statute of frauds, on the ground that it did not express the consideration. But the guaranty referred to a note which did express a consideration, received by the principal debtor. The legal import and language of the defendant's contract, therefore was, that in consideration of money, or some other value received by the principal debtor, he, the defendant, undertook that this note should be paid at maturity. As both instruments were executed and delivered at the same time, and to the same person, the presumption of law was that both were the foundation of the credit; in other words, that the value, which the note expressed, in the general language used in such instruments, was parted with by the payee, on the strength of the guaranty, as well as the note. These principles of construction, which, I persuade myself, are simple and elementary, if they had been adopted, would have led to a different conclusion. But they do not appear to have been overlooked. The precise error in the case, it seems to me, was in looking at the guaranty, without looking at the other instrument, which became a part of it by express reference. This was discarding a universal rule for the interpretation of writings. I fully agree that the statute of frauds, in its very letter, requires a consideration to be expressed in the collateral undertaking. But what is the collateral undertaking? The answer plainly is, that it is made up, not only of the particular writing to which the name of the guarantor is signed, but of all others which that refers to and adopts. If, therefore, the consideration appears in any one of the writings, which, together, constitute the contract, the requirement of the statute is answered.

Cases, almost without number, might be cited to support the rule of construction here laid down. Without referring to them at large, I will mention one of a very marked character, which arose under a statute quite as precise, in its terms, as the statute of frauds. In *Tonnelle v. Hall* (4 Comst., 140), a testator had disposed of real estate, in the body of his will, by designating the numbers of the lots, according to a map, a copy of which was attached after the signatures of the testator and the witnesses. The reference to the map was as follows: "Which

said lots are designated on a certain map, now on file in the office of the register of the city and county of New York, a copy of which, on a reduced scale, is hereto annexed," and then followed a particular description of the map on file. A blank sheet intervened between the attestation clause of the will and the signatures, and the copy of the map. There was in the body of the will no description of the real estate sufficient to pass the title thereto, without a reference to the map. The statute of wills requires that the testator shall "subscribe," and the witnesses shall "sign" their names at "*the end of the will.*" This court held, upon the fullest consideration, that the map was, in judgment of law, incorporated into the body of the will; and consequently that the instrument was subscribed, at the end thereof, as the statute required. This decision is of great significance, when it is considered that the statute of wills, as contained in the Revision of 1830, was designed to abrogate the construction which had been given to the English and our own former statute, by requiring the testator's signature to be written in a literal and exact sense, at the end of the will.

Referring now again to *Brewster v. Silence*, I find it suggested in the opinion which is reported, that our present statute of frauds was intended to alter the former one, by requiring the consideration to be expressed. It is added, that "since the Revised Statutes, something more than mere argument and inference have been deemed necessary to make out a consideration." With much deference, I think that such suggestions are not entitled to the weight which appears to have been given to them in determining that case. The statute of frauds, in the respect under consideration, underwent no change in our revision. It had been long and perfectly well settled, both in England and this State, that by force of the word "agreement," contained in the old statute, the consideration, as well as the promise, must be expressed where the undertaking was to answer for the debt or default of another person. Then as to "mere argument and inference," if, by the use of this phraseology, the learned judge who gave the opinion intended to say that argument and inference are to be excluded in the consideration of these

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questions, the proposition seems to me to be plainly unphilosophical and unsound. It is enough on this point to say, that wherever there is room for difference of opinion, the construction of a written instrument is always open to argument, and that whatever may be fairly inferred from the language used, and the surrounding circumstances viewed in connection therewith, is in judgment of law a part of the written language itself. These principles are applicable to all contracts, those coming within the statute of frauds forming no exception. I agree that a consideration is not to be implied, but this only means that when there is no expression of the parties, in any part of the contract, from which a just inference can be drawn, there is no mere implication of law that a fact exists, in regard to which the instrument itself is entirely silent. The distinction between express and implied covenants, will illustrate the idea. Express covenants are created by any words, in a sealed agreement, evincing an intention to be bound by the obligation. Every form of expression, however slight and inartificial, declaratory of such an intention is an express covenant. Implied covenants, on the other hand, are those which depend for their existence on a mere intendment of law. Thus, a lease without any expression, whatever, beyond the usual words of demise, imports a covenant for quiet enjoyment. So, according to the common law, a covenant was implied from certain words in a deed, which were literally words of grant or conveyance only. (Platt on Covenants, 26, 40.) The statute of frauds requires certain contracts to be in writing, and the consideration to be expressed. By this it was simply intended that the courts are not to imply a consideration, or suffer it to be proved by parol, when none appears in the terms or admissions of the contract itself. But the mode of expression is not determined by the statute. It may be in plain and direct words: it may be by the mere use of a seal: or it may be the result of a just inference from the language of the contract, examined in all its parts.

This question has very lately been examined and decided by the Supreme Court of New Hampshire, in the case of *Simmons v. Steele* (36 N. H., 73). In that case the principal debtor,

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which was the New Hampshire Central Railroad, had signed a writing acknowledging the receipt, from the plaintiff, of seventy-two shares of stock, and promising to return the same in one year, with certain interest specified. The defendants, at the same time, executed a collateral instrument at the foot of the other, in this language: "We guarantee the fulfillment of the above obligation, and hereby promise that said stock shall be returned at the time specified." The action was on that guaranty, and the question, under the statute of frauds, was, whether it expressed a consideration. The court held that it did, and the reasons given for that conclusion appear to me entirely unanswerable. "It is very clearly apparent," the court said, "from an inspection of both what are called the principal and collateral contracts, that both were made at the same time, and for the same consideration, to wit: The loaning of the stock to the Central Railroad—and also that the collateral contract was an essential ground of the credit given to the principal, or direct debtor. In such cases it is not necessary that there should exist, or be expressed in writing, any other consideration than that moving between the creditor and original debtor, for the consideration of one is manifestly that of the other." Again it was observed, "Here is such an intimate connection in sense between the two agreements, apparent on their face, that there can be no difficulty in collecting, without the aid of parol evidence, from the principal agreement, the consideration of the collateral one. The reference in the latter to the terms of the former is equivalent to an admission; at all events, the fair and necessary implication is, that the consideration of the defendants' promise was the receipt by the said railroad of the borrowed stock. The only legitimate inference from the expressions used in the contract of guaranty itself is, that such was the consideration of the defendants' engagement."

This conclusion of the Supreme Court of New Hampshire is identical with the main proposition enunciated by Chief Justice KENT, in *Leonard v. Vredenburg* (8 Johns., 28), the correctness of which was never questioned in this State for forty years. I have looked at all the cases antecedent to the decision

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in *Brewster v. Silence*, and I am confident that not one of them is in conflict with that proposition. On the contrary, there are few cases in the books which have been more frequently referred to, as the unquestioned law of the land, in respect to the main point determined. That point was, that a guaranty at the foot of a note, executed at the same time, and delivered with it, is to be read in connection with the principal contract, and is supported by the same consideration. The doctrine was not applied by Chief Justice KENT, and I do not apply it, to cases where the consideration between the principal parties is executed and past before the guaranty is made. In such cases, the difficulty is not in the want of a consideration expressed, but it arises out of the insufficiency of that consideration to sustain a collateral promise, whether in writing or not. To this class belong the cases of *Smith v. Ives* (15 Wend., 182), *Parker v. Wilson* (*Id.*, 343), *Hall v. Farmer* (5 Denio, 484), *S. C.* on appeal (2 Comst., 553), and these were the only ones cited in *Brewster v. Silence*, which were supposed to have the slightest tendency to support that decision. In all these cases, remarks of a general nature were made by judges, relative to the necessity of having a consideration appear upon the face of such collateral promises, as come within the statute of frauds. Such a proposition, no one disputes; but the precise point is whether the requirement of the statute is not complied with, when a guaranty refers in terms to another contract, made and delivered at the same moment of time, in which a present consideration, for both the writings, is expressly stated. Believing this to be a plain question, upon the examination I have now given to it, and that great mischief and inconvenience will arise in the business of the community, if error shall become established law on this subject, I have felt it necessary to make these comments upon one of the decisions of this court. I have made them with greater freedom, because I followed that decision, with my associates, in the very recent one which has been mentioned. With my present convictions, I shall be prepared, hereafter, to uphold the contracts and dealings of men belonging to the class which are condemned in the decision re-

ferred to. We ought to feel no hesitation in correcting the error, if there be one; because its correction can do no possible injury. When the rules laid down by the courts become the laws which sustain titles and contracts, they are, in general, to be sacredly adhered to, but when they can be used only as instruments of destruction, error ceases to be sacred, and principle and truth ought to be reasserted.

I am of opinion, however, that the court below erred in supposing that the present case was entirely undistinguishable from that of *Brewster v. Silence*. In that case the guaranty, without a reference to the note at the foot of which it was written, did not state a consideration. In the present one, the instrument, examined by itself, shows that the plaintiff was proposing to sell goods to the principal debtor, and that the guaranty was intended to assure to him the payment for those goods. I think, myself, that this distinction is of no great value; because, for the reasons which have been given, I do not doubt that the defendants' agreement would, for every legal purpose, have been the same, if, referring to the principal contract, it had simply, and without other words, guarantied the performance thereof. If that had been the form of the writing, the one to which it was annexed, and to which it referred, would have shown with equal clearness that the intended sale of goods was the basis of both the contracts. There cannot be much difference between a promise, which, by its own terms, guaranties a certain debt to be contracted by another person, and one which, in general words, refers to, and guaranties the performance of the other person's obligation, when that obligation, on its face, shows that the thing guarantied is precisely the same. Nor can there be any wide distinction between a collateral undertaking, in either of these forms, to answer for a credit to be given, and one to answer for a credit actually given at the very moment when the undertaking is entered into. If in one of these examples, we may look at the principal writing, in order to ascertain what it is that is guarantied by the instrument annexed, and thus to learn the consideration, we surely may do so in the other. Upon distinctions such as these, however

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slender as they seem to be, the case of *Brewster v. Silence* must have proceeded, and they are therefore just as valuable as are the principles which that decision involves. If we are to understand that case as not resting upon such distinctions, then we must view it as directly in conflict with the *Union Bank v. Coster's Executors*, also determined by this court, and with a long and unbroken series of decisions in the courts of England, and in this State. But the *Union Bank v. Coster's Executors*, and the numerous class of cases to which it belongs, do not appear to have been even referred to; and therefore it could not have been intended to overrule them. In that class the present controversy is included; and however slight or groundless, in principle, may be the distinction between it and the case which the court below profess to have followed, it is nevertheless a distinction which offers the only solution to that case.

Entertaining no doubt that the instrument, on which this suit was brought, is a valid guaranty within the statute of frauds, I think the judgment of the Supreme Court should be reversed and a new trial granted.

WELLES, J., concurred in this opinion; DAVIES and BACON, Js., were for reversal, expressing no opinion in respect to the points of difference in the reasoning of COMSTOCK, Ch. J., and WRIGHT, J.

Judgment reversed and new trial ordered.

CARDELL, executrix, &c., of William Cardell, deceased,
v. MCNIEL.

The defendant making a purchase agreed to deliver, in part payment, the chattel note of a third person, and said the maker was good, and he would warrant the plaintiff would get the chattel when the note became due: *Held*, that the warranty was not within the Statute of Frauds.

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The undertaking by parol being valid, it was not waived by the plaintiff's acceptance of the note without any written guaranty.
The warranty construed as for the payment and not for the collection of the chattel note.

APPEAL from the Supreme Court. Action on a verbal undertaking, that a chattel note was good and collectable, which had been delivered by the defendant to the plaintiff, in part payment for a horse, and by which the maker, one Cornell, promised to pay \$125, "in a top buggy, worth the amount above stated, to be paid on the 29th day of June next; dated May 5th, 1854," and that the same would be paid when due. The trial was before a referee, who ordered judgment for the plaintiff; which having been affirmed at general term in the fifth district, the defendant appealed to this court. The facts appear in the following opinion. The case was submitted on printed arguments.

Le Roy Morgan, for the appellant.

M. B. Church, for the respondent,

Argued that the following facts were established on the trial:

1. That the appellant, by his agent, Abram Acker, in the forepart of May, 1854, purchased of the respondent a stud-horse, for the price of \$500: that in part payment for said horse, the respondent took of the appellant a note of \$125, executed by one Henry Cornell, payable in a light top buggy wagon, on the 29th day of June then next. That at the time of such purchase, the appellant, by his said agent, warranted the payment of the said note.

2. That when said note became due, said respondent called on said Cornell for the buggy, and was informed by him that he was not able to deliver it: that it was unfinished and was incumbered by mortgages, and that said buggy was not made or turned out on the note, when the same became due.

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3. That when said note became due, and payment thereon was refused, the same was prosecuted to judgment and execution, and a return of *nulla bona*.

4. That Acker was the duly constituted agent of McNiel, and, as such, was fully authorized to warrant the note.

5. That on the trial before the referee, the plaintiff offered, in evidence, an assignment of the judgment against Cornell in favor of plaintiff, dated and acknowledged April 27th, 1855, for the benefit of, and to be delivered up to the defendant, and tendered the assignment to the referee for that purpose.

I. The writing by McNiel to Acker, and by him presented to Cardell, as his authority to trade for McNiel, constituted Acker an agent, with unlimited authority to make any trade in relation to the horse in question, and McNiel is as much bound by the trade, thus made by his agent, as if he had made it himself in person. (Story on Contracts, § 135.)

II. McNiel, by his agent, guaranteed the payment of the Cornell note, at maturity, and this was part of the bargain. His undertaking was not conditional like that of an indorser; it was an absolute and unconditional agreement that the note should be paid by Cornell at maturity. When, therefore, Cornell failed to pay, the defendant's contract was broken, and the plaintiff had a complete right of action against him. The guaranty was not in writing, nor was any writing necessary to its validity. (*Brown v. Curtiss*, 2 Comst., 225; *Johnson v. Gilbert*, 4 Hill, 178, and 11 Barb. S. C. R., 485.)

III. The plaintiff was not bound to proceed to judgment and execution against Cornell, before bringing his action. (*Brown v. Curtiss*, 2 Comst., 225, above cited.)

IV. The facts found by the referee fully justify the conclusion of law, at which he arrived. It is true that the testimony of the witnesses clash somewhat; but when there is contradictory evidence, it is the province of the referee to settle and reconcile such contradiction, and find what the facts are. (*Noyes v. Hewett*, 18 Wend., 141; *Oakley v. Van Horn*, 21 Wend. 805; *Baum v. Tarpeny*, 3 Hill, 75.)

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V. No question was raised on the trial as to the sufficiency of the complaint, or any variance between it and the evidence, and it is too late to raise such a question on the argument of the appeal for the first time.

If the complaint had been defective, it might have been amended on motion; but I submit, there is no defect in it—it is too late now to raise the question. (*Palmer v. Lorillard*, 16 J. R., 348; *Beekman v. Frost*, 18 J. R., 544; *Walker v. Harris*, 20 Wend., 555.)

COMSTOCK, Ch. J. The contract for the sale of the plaintiff's horse to the defendant, was concluded on the part of the latter by his agent, Acker. The agent acted under a written authority contained in a note addressed by the defendant to the plaintiff, stating that any bargain which Acker might make, would be satisfactory to him, the defendant. This was a general authority, and very plainly it justified the agent in making the engagement on which this suit was brought.

By the terms of the contract, as testified to by the plaintiff's witness, Greenfield, and as found by the referee, the horse was to be paid for in a span of horses owned by the defendant, which were to be delivered to the plaintiff; by a note of \$110, to be signed by the defendant and one Ingham; by a note of \$40, given by one Burk; and by a note of \$125, given by one Cornell, payable in a buggy, on the 29th of June, 1854. The defendant, through his agent, warranted Cornell to be "good," and that the plaintiff would get the buggy when the note became due. On these terms the sale was completed, and the plaintiff delivered his horse. The notes were to be sent to the plaintiff on the following day, and they were sent accordingly. There was no written guaranty of the note of Cornell, which turned out to be worthless. The action is founded on the verbal undertaking.

We think that the plaintiff's acceptance of the note when it was sent to him, without a guaranty indorsed, worked no change in the terms of the contract. The defendant, by his agent, agreed to be answerable for the payment of the note.

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If that agreement was valid in law, without being committed to writing, there is no fair pretence for saying that it was waived or discharged because it was not written upon or annexed to the note, when the note was sent to the plaintiff and accepted by him. The guaranty was a verbal one, and was accepted as such when the horse was delivered on the completion of the sale, and there is nothing in the finding of the referee, or in the evidence, tending to show that a written undertaking was in the contemplation of the parties. The defendant, in effect, said: "I will send you the note of Cornell, and I agree to be answerable for its payment." I am unable to see how the acceptance of the note waived the agreement.

We think, in the next place, that the guaranty was, in effect, one of payment, according to the terms of the note, and not for the collection of the demand by process of law. The evidence and the finding are, that the defendant's agent said that the maker was good, and that he would warrant that the plaintiff would get the buggy when the note fell due. The obvious meaning of this is, that the obligation would be paid at maturity, and according to its terms. The contract was, therefore, broken, and the defendant became liable to suit upon it, when Cornell failed to pay, after payment was due.

It is claimed that the guaranty is void by the statute of frauds. In mere form it was certainly a collateral undertaking, because it was a promise that another person should perform his obligation. But, looking at the substance of the transaction, we see that the defendant paid, in this manner, a part of the price of a horse sold to himself. In a sense merely formal, he agreed to answer for the debt of Cornell. In reality he undertook to pay his own vendor so much of the price of the chattel, unless a third person should make the payment for him, and thereby discharge him. The question at this time hardly claims a discussion, because it was, in effect, decided by this court upon the fullest consideration, in *Brown v. Curtis* (2 Comst., 225). There the holder of a note transferred it in payment of his own debt, indorsing upon it a guaranty of the payment which expressed no consideration; and on that ground the undertak-

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ing was claimed to be void. It was conceded to be void, provided the statute applied to such a case. It was, however, held to be a valid promise, on the ground that the statute did not apply. "In such cases," it was observed, "where the party undertakes, for his own benefit, upon a full consideration received by himself, the promise is not within the statute." It is impossible to distinguish, in principle, between that case and the present: certainly no distinction can be drawn favorable to the defendant. (*Johnson v. Gilbert*, 4 Hill, 178; *Nelson v. Boynton*, 3 Metc., 400.)

The note of Cornell not being paid at maturity, the defendant became absolutely charged as the guarantor, and the debt was from that time due in money. It is urged, however, that the defendant was discharged, by a new arrangement made between the plaintiff and Cornell. This arrangement is not found by the referee, and that alone would be a sufficient answer to the proposition. But, upon the evidence, it is only claimed that the plaintiff agreed to wait for the buggy six weeks longer, that Cornell agreed to deliver it at the expiration of that time, and if its value was more than \$125, then that the difference was to be paid. There is no pretence that the article was in fact ever offered to the plaintiff, or, indeed, that it was ever made for him. Assuming such an agreement to have been proved, it was purely executory; it was never, in fact, executed; and, upon the plain principles of law, it did not discharge the previous liability either of Cornell or of the defendant. There was no contract for a different article, which professed to bind both the parties, and nothing, therefore, in judgment of law, was substituted for the pre-existing agreement. There was simply an extension of time, founded on no consideration, and therefore binding on no one.

It is further said that the complaint counts upon a warranty of the note, made at the time it was sent and delivered to the plaintiff; whereas the proof showed that the only warranty, if made at all, was given previously, at the consummation of the sale, when the horse was delivered. To this we answer: the variance does not appear to have been mentioned at the

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trial, and, if it had been, the pleading might have been amended, if necessary, in the court below. In this court we do not reverse judgments upon objections of such a character.

All the judges concurring,

Judgment affirmed.

END OF CASES DECIDED AT MARCH TERM.

CASES
ARGUED AND DETERMINED
IN THE
COURT OF APPEALS
OF THE
STATE OF NEW YORK.

June Term, 1860.

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21	343
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21	343
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KORTRIGHT v. CADY.

Tender of the money due upon a mortgage, at any time before foreclosure, discharges the lien, though made after the law day, and not kept good. Where, as in this case, the tender does not discharge the debt, but only defeats a particular remedy, it is unnecessary to show continued readiness to pay or to bring the money into court.

APPEAL from the Supreme Court. Action to foreclose a mortgage. The defendant Cady was a subsequent grantee of the equity of redemption. He averred in his answer, and proved on the trial, that, after the money secured by the mortgage had become due and the stipulated day for payment had passed, he tendered to the plaintiff the amount due for principal and interest. The plaintiff refused to receive it unless Cady would also pay certain taxes upon the mortgaged premises, which the plaintiff had discharged. It was held that Cady was, for reasons unnecessary to be stated, under no obligation to pay

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the taxes, and the case stood upon the naked tender. Cady did not, in his answer, allege a readiness still to pay the mortgage debt, or that it was paid into court, nor did he offer to bring it into court; and it did not appear, from the finding of facts or otherwise, that he in any way kept the tender good. The plaintiff had the usual judgment of foreclosure, and for a sale of the mortgaged premises. Upon appeal by the defendant Cady, this judgment was affirmed at general term in the first district; whereupon he appealed to this court.

Joshua M. Van Cott, for the appellant.

Joseph Blunt, for the respondent.

DAVIES, J. The common law recognized two kinds of landed security, respectively known as the *vivum vadium*, and *mortuum vadium*. The *vivum vadium* consisted of a feoffment to the creditor and his heirs, until out of the rents and profits he had satisfied himself his debt. The creditor took actual possession of the estate, and received the rents and applied them from time to time in liquidation of the debt. When it was satisfied, the debtor might reënter and maintain ejectment, and it was said to have been called *vivum vadium*, because neither debt nor estate was lost. This mode of security is said not to have been very general, and it was superseded by the *mortuum vadium*, or mortgage, so called because on breach of condition the estate was rendered indefeasible in the mortgagee, and absolutely lost to the mortgagor. Littleton, section 382, thus describes the *mortuum vadium*, or mortgage: "Item: if a feoffment be made upon such condition that if the feoffer pay to the feoffee at a certain day, &c., forty pounds of money, that then the feoffee may reënter, &c. In this case the feoffee is called the tenant in mortgage, which is as much as to say in French, *come mortgage*, and in Latin, *mortuum vadium*; and it seemeth that the cause why it is called a mortgage is, for that it is doubtful whether the feoffer will pay at the day limited such sum or not; and if he doth not pay, then the land which is put in

pledge upon condition for the payment of the money is taken from him forever, and so dead to him upon condition, &c. And if he doth pay the money, then the pledge is dead as to the tenant." Upon the execution of such a mortgage, the legal estate vests in the mortgagee, subject to be defeated on performance of the condition by the mortgagor. To divest the estate of the mortgagee, it was necessary for the mortgagor to make payment at the day according to the condition of the mortgage; or if, at the appointed day, legal tender of the money was made and refused, the condition was satisfied equally as if payment had been made, and the mortgagor or his heirs might reënter. This appointed day for the payment of the money, to secure which the mortgage was given, became known in legal parlance as *the law day*. But a distinction was taken between a sum in the nature of a gift secured on the land, and where the security was given to secure a debt due. The former was, in the case of a tender and refusal, absolutely lost; but the latter, the debt, was regarded as still subsisting as a personal duty, and might be recovered by action at law. As if A borroweth a hundred pounds of B, and after mortgageth lands to B, upon condition for payment thereof, if A tender the money to B, and he refuseth it, A may enter into the land, and the land is freed forever of the condition; but yet the debt remaineth, and may be recovered by action of debt. But if A, without any loan, debt or duty preceding, enfeoff B of land upon condition for the payment of a hundred pounds to B, in the nature of a gratuity or gift, in that case if he tender the hundred pounds to him according to the condition, and he refuseth it, B hath no remedy therefor. (Co. Litt., 209 b.) Littleton, in section 335, says that it is to be remembered that when such tender of the money is made, and the feoffee refuse to receive it, then the feoffee hath no remedy by the common law, because it shall be accounted his own folly that he refused the money when a lawful tender of it was made to him. The same writer, in section 338, says that in all cases of condition for payment of a certain sum, in gross, touching lands or tenements, if lawful tender be once refused, he which ought to

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tender the money is of this quit, and fully discharged forever afterwards.

Coke, in his Commentaries, in reference to these rules, as applicable to tenders and their effect, says it is to be implied that the tender is made at the due time and place according to the condition. The reason for this is obvious, under the rules already stated, as applicable to the absolute vesting of the estate in England in the mortgagee, upon the condition broken. If tender or payment was not made at the law day, according to the condition, the estate vested absolutely in the mortgagee; and by the strict rules of the common law, all interest or right therein, of redemption, passed from the mortgagor. If the mortgage debt was afterwards paid by the mortgagor, a reconveyance of the estate by the mortgagee was necessary to vest the same in the mortgagor. By the civil law, the debtor might redeem the estate on payment of his debt, at any time before sentence passed. The doctrine of forfeiture of the common law was decidedly opposed to this principle. In the eye of equity, the absolute forfeiture of the estate, whatever might be its value, on the breach of the condition, was regarded as a flagrant injustice and hardship, although perfectly accordant with the system on which the mortgage itself was grounded. The courts of equity, therefore, stepped in to moderate the severity with which the common law followed the breach of the condition. Leaving the forfeiture to its legal consequences, they operated on the conscience of the mortgagee, and acting *in personam*, and not *in rem*, they declared it unreasonable that he should retain for his own benefit what was intended as a mere pledge; and they adjudged that the breach of the condition was in the nature of a penalty which ought to be relieved against, and that the mortgagor had an equity to redeem on payment of principal and interest and costs, notwithstanding the forfeiture at law. Thence grew up the system in England of filing bills in equity to redeem, and in this State the filing of bills in equity by the mortgagee to foreclose and cut off this right of redemption in the mortgagor.

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The rule in England was therefore ancient and well settled, that payment on the law day extinguished the interest of the mortgagee in the lands mortgaged; and tender and refusal at the same time produced the same result. But payment after, and acceptance, did not re-vest the estate in the mortgagor without a reconveyance from the mortgagee; and a tender and refusal would, of course, not produce that result. The mortgagor's only remedy was to avail himself of the benefit of the rule in equity, and file his bill to redeem. The only question presented for our consideration in this case is, whether a tender of the sum due on a mortgage, after the day appointed by it for its payment, extinguishes the lien of the mortgage on the land covered by it. We have seen that by the common law such tender and refusal upon the law day extinguishes the lien of the mortgage, though the debt remains. In this State, the law is well settled that a mortgage is a mere security or pledge of the land covered by it for the money borrowed or owing, and referred to in it, and that the mortgagor remains the owner of the estate mortgaged, and may maintain trespass as against even the mortgagee. (*Runyan v. Mersereau*, 11 John., 584.) The debt, in the eye of the law, thus becomes the principal, and the landed security merely appurtenant and secondary; and the rights of the parties must be governed by those principles of law applicable to analogous cases. Acceptance of payment of the amount due on a mortgage, at any time before foreclosure, has always been held to discharge the incumbrance on the land; as acceptance of the amount for which personal property was held discharged it from the pledge. Tender and refusal are equivalent to performance. (*Kemble v. Walkie*, 10 Wend., 374.) This is to be taken with the reservation already stated, that the debt or duty remained, and that the rejected tender, at or after the stipulated time of payment or performance, has the effect only to discharge the party thus making it from all the contingent, consequential or accessory responsibilities and incidents of his contract, but without releasing his prior debt. (*Coit v. Houston*, 8 John. Ca., 243.) In *Hunter v. Le Conte* (6 Cow., 728), the Supreme Court held that a tender of

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rent takes away the right to distrain till a subsequent demand and refusal; but it does not take away the right to sue for the rent as for a debt. It only saves the interest and costs. And that a tender of rent makes a distress wrongful, though the tender be not made till after the rent day. It will readily be perceived that the principle of this case bears directly upon the question now under consideration; and it is not perceived, if it be sound, why a tender and refusal of the amount due on a mortgage does not extinguish its lien, equally with a tender of rent and refusal, which, as we have seen, extinguishes the right of distress. But a still closer analogy to the present question is presented by the law of tender, as to the lien on goods pledged. Lord Ch. J. HOLT, in his opinion in the celebrated case of *Coggs v. Bernard* (2 Lord Ray., 909), speaking of the fourth class of bailments, says: "If the money for which the goods are pawned be tendered to the pawnee before they are lost, then the pawnee shall be answerable for them, because the pawnee, by detaining them after the tender of the money, is a wrongdoer, and it is a wrongful detainer of the goods, and the special property of the pawnee is determined." So also COMYN: "By tender of the money, the property in the goods is determined, and the pledge ought to be returned. But if the pawnee refuse to restore the pledge upon tender, trover lies against him." (Comyn's Dig., tit. Mortg., A, and cases there cited.) Holding, as we do, therefore, in this State, that the land mortgaged is but a security for the debt due to the mortgagee, in other words, a pledge to him to secure its payment, it is difficult to see why the principles enunciated and well settled in reference to the pledge of personal property do not apply, and why a tender and refusal at any time of the full amount of the debt due does not extinguish the lien of the mortgagee, or pledgee, in the one case as it clearly does in the other.

But I think we are not left at liberty to settle this case on principle, but are to regard it as authoritatively disposed of by the courts of this State. A very careful examination of the decisions has brought my mind to the conviction, contrary

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to my first impression, that we should regard the question now presented as not open to further discussion. I shall recur to the cases in which this question has arisen; and I think an examination of them will lead to the same conclusions to which I have arrived.

The first in chronological order is that of *Jackson v. Crafts* (18 John, 110), decided in the Supreme Court in 1820. In that case, the defendant, the mortgagor, while the advertisement of the sale of the mortgaged premises was pending, tendered to the plaintiff, an assignee of a bond and mortgage on premises occupied and owned by the defendant, the amount due on the mortgage and the expense of the advertisement of sale. The tender was made to the attorney for the plaintiff, who had in his hands the bond and mortgage for foreclosure. The money was refused and the sale took place, and the plaintiff became the purchaser and brought ejectment for the premises. The case turned upon the effect of the tender, made, as it was conceded, after the law day. The court held that the tender and refusal, although made after the law day, extinguished the lien of the mortgage, and that the plaintiff could not recover. This case has been criticised and its authority attempted to be weakened, because, in the citations from Bacon and Coke, the distinction was not noticed that they referred to and spoke of the effect of tenders at the law day. But an examination of the context of the opinion shows, I think, that the learned judge who delivered it was not unmindful of this fact, and intended to hold that, in the light mortgages were regarded in this State, it was quite unimportant whether the tender was made at the law day or after. The court, in that case, certainly held that a tender after the law day extinguished the lien of the mortgage.

In *Merritt v. Lambert* (7 Paige, 344), decided by Chancellor WALWORTH in 1838, he held that a tender of the amount due on a mortgage after the law day did not extinguish the lien of the mortgage. He reviews the decision of the Supreme Court in *Jackson v. Crafts* (*supra*), and holds that it is not sound law.

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The same question arose again in the Supreme Court, in the case of *Edwards v. Farmers' Fire Insurance and Loan Company* (21 Wend., 467). It is to be observed that this case and that of *Merritt v. Lambert* originated from the same transaction. Edwards the mortgagor, after the law day had passed, tendered to the defendants, the mortgagees, the full amount of the mortgage and the costs and expenses of a foreclosure and sale upon which the defendants had become the purchasers. It was contended on the part of the plaintiff, and so held by the court, that the defendants, by the sale at which they became purchasers, on the foreclosure of a mortgage to them, stood in the same position they did originally as mortgagees, and had no higher or other rights or equities. Other questions arose in the case; but the main one discussed, and upon which the Supreme Court passed, was, whether the tender and refusal after the law day extinguished the lien of the mortgage. The opinion of the court was delivered by COWEN, J., who exhausted the law on the subject. His reasons and the authorities there cited seem to me fully to sustain the conclusion to which he arrived, that in this State a tender and refusal of the amount due, at any time after the mortgage debt became due, extinguished the lien of the mortgage. Chief Justice NELSON concurred in this result—Justice BRONSON dissenting. The case was taken to the Court for the Correction of Errors, and the judgment of the Supreme Court was affirmed. (26 Wend., 541.) Two opinions were delivered in that court: one by Chancellor WALWORTH, in favor of reversing the judgment of the Supreme Court, on two grounds—first, that the agreement for sale made by the company with the Merritts, mentioned in the pleadings, was a valid sale by the defendants of the premises within the meaning of their charter, and that consequently they were no longer the owners of the mortgaged premises; second, that the tender of the mortgage money after there had been a default to pay it at the day cannot have the legal effect of depriving the mortgagee of his security, if for any cause he does not think proper then to receive the amount so tendered. The Chancellor enlarges upon the second ground,

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and restates the reasons which he had given for his opinion in *Merritt v. Lambert* (*supra*). He says: "It now remains for the other members of this court to decide whether the Vice-Chancellor and Mr. Justice BRONSON and myself, on the one side, or the other two Justices of the Supreme Court and the Assistant Vice-Chancellor, on the other, have taken the correct view of the important legal questions involved in the case." It does not appear from the reported cases whether the Vice-Chancellor and Mr. Justice BRONSON concurred with the Chancellor in his views on the second point above referred to, and which, it is evident, he regarded as the controlling one in the case. This question is the main one considered by Senator VERPLANCE, who delivered the opinion of the court for affirmance. He discusses this question with his usual learning and research, and arrives at the clear conclusion that a tender of the amount due on a mortgage after the law day, extinguishes the lien of the mortgage. It does not appear distinctly that all the judges voting for affirmance concurred with him upon this ground; but I think the case, as stated by the reporter, shows that they must have done so. If we should adhere to the rule laid down by this court in *James v. Patten* (2 Seld., 9), it must be held that the judges concurring in the opinion delivered by Senator VERPLANCE are to be regarded as agreeing with him upon all the points discussed; but, irrespective of that rule, we think it quite clear that the case was decided on that point.

The same question was again presented in the Supreme Court in *Arnot v. Post* (6 Hill, 65). The court was then held by the same judges as sat in *Edwards v. Farmers' Fire Insurance and Loan Company* (*supra*). BRONSON, J., delivered the opinion of the court in this case, and says: "It has always been held that a tender at the day discharged the lien of the mortgage; and although a clear departure from the old law, it is fully settled in this State that a tender after the day will have the same effect. (Citing *Jackson v. Crafts*, and *Edwards v. Farmers' Loan Company*, *supra*.) I know that in the case of *Edwards v. Farmers' Loan Company* the law day was extended by the charter of the company; but the broad principle was asserted

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that a tender at any time before foreclosure, although the law day has passed, will have the effect of discharging the lien of the mortgage." The judgment in this case was reversed in the Court for the Correction of Errors, by a vote of eleven to nine. (2 Denio, 844.) Senator HARD, who delivered the first opinion for reversal, says: "It is undoubtedly a well settled principle, that a tender at the day of the amount secured by a mortgage upon lands extinguishes the lien. It has been decided in this State, although the principle is a departure from the ancient law, that a tender *after the day* and before foreclosure discharges the lien." But he adds, that, "where the mortgage has been foreclosed, there is no authority for saying that a tender to the purchaser under the foreclosure will extinguish his title." He then discusses the cases of *Jackson v. Crafts*, and *Edwards v. Farmers' Loan Company*, and holds that they decide nothing in conflict with this proposition. Upon this ground he was for reversal of the judgment of the Supreme Court; and he certainly advances nothing in conflict with what he states had been decided in this State, to wit, that a tender after the day and before foreclosure discharges the lien. An examination of the opinion delivered by Senator PORTER will show that his vote for reversal proceeded on the ground that the purchaser at the mortgage sale could not be divested of the title he acquired at it, by a tender of the amount due on the mortgage by the mortgagor. I do not understand this Senator as advancing any idea in conflict with the rule of decision as stated by Senator HARD.

It is true that Senator JOHNSON, in his opinion, proceeds to show that the cases of *Jackson v. Crafts* and *Edwards v. Farmers' Loan and Trust Company* fail to establish the rule that an unaccepted tender to the creditor by one entitled to redeem a mortgage, made after the law day, will extinguish the lien of the mortgage. After discussing these cases, he says: "I think, therefore, it may be safely assumed that there is no binding authority requiring us to hold that a mere tender after the day of payment has passed, will have the effect of discharging the lien." He then discussed the effect of the sale upon the right

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of redemption; and upon both grounds was in favor of reversing the judgment of the Supreme Court. Senator SEDGWICK concurred with Senator JOHNSON substantially, and Senators BOCKEE and OLARK delivered verbal opinions in favor of reversing, on the ground that a tender after the law day did not extinguish the lien. TALCOTT, Senator, who delivered an opinion for affirmance, discusses both grounds; and, in reference to the tender extinguishing the lien of the mortgage, says, after citing the cases of *Jackson v. Crafts* and *Edwards v. Farmers' Loan Company*, and that of *Burnett v. Denniston* (5 John. Ch., 35): "These cases hold that a tender will discharge the lien of the mortgage, though not made until after the law day; and that doctrine is in accordance with the theory of mortgages now well established by a series of recent decisions." GARDNER, President, delivered an opinion in favor of affirmance, discussing only the effect of the sale; and Senator LESTER also delivered an opinion for affirmance, on what grounds it is not stated. Assuming that the nine members who voted for affirmance concurred in the opinion of Senator TALCOTT, and that the five Senators who voted for reversal, and expressed no opinion, concurred in the views expressed by Senators JOHNSON, SEDGWICK, BOCKEE and OLARK, we then have eleven members of the court affirming it to be the well settled rule in this State that a tender after the law day will extinguish the lien of the mortgage.

This brief review of the course of decisions in this State, it is submitted, shows that, in truth, the rule has prevailed here, and been well recognized, ever since the decision of *Jackson and Crafts* in 1820; and that the doubts thrown upon that decision by the Chancellor, in *Merritt v. Lambert*, have never been adopted by any other court in this State, but were distinctly repudiated and overruled by the Court of Errors in *Edwards v. Farmers' Loan and Trust Company*, and by the Supreme Court subsequently in *Arnot v. Post*; and this rule was again affirmed in that case by the Court of Errors, in 1845. We are bound, therefore, I think, to regard this as the settled law of this State, and are not at liberty to return to

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the old rule of the common law, which has been shown to be wholly inapplicable to the light in which mortgages are regarded in this State.

It is not perceived how the mortgagee is to be embarrassed, or his security impaired, by the adoption of this rule, as seems to be supposed by the Chancellor in *Edwards v. Farmers' Loan Company* (26 Wend., 552). If the mortgagor does not tender the full amount due, the lien of the mortgage is not extinguished. The mortgagee runs no risk in accepting the tender. If it is the full amount due, his mortgage lien is extinguished and his debt is paid. This is all he has a right to demand or expect, and all he can in any contingency obtain. His acceptance of the money tendered, if inadequate and less than the amount actually due, only extinguishes the lien *pro tanto*, and the mortgage remains intact for the residue. A much greater hardship might be imposed, and serious injury be produced, by holding that the mortgagor cannot extinguish the lien of the mortgage by a tender of the full amount due. It has never occurred to any judge to argue that a pawnee was in great péril, and in danger of losing the benefit of his pawn, by the enforcement of the well settled rule, that a tender of the amount of the loan and interest, and refusal, extinguished the lien on the pawn. Littleton well says, that it shall be accounted a man's own folly that he refused the money when a lawful tender of it was made to him. The only effect upon the rights of the mortgagee is, that the land or thing pledged is released from the lien, but the debt remaineth.

The only remaining question to be considered is, whether the tender in this case was well made, it not being followed with the allegation of *touts temps prist*, and the money not having been brought into court. It will be seen, by reference to the authorities, that these are not required when the tender has only the effect of extinguishing the lien, and does not operate to discharge the debt or sum owing. In the latter case, the averment of *touts temps prist*, followed up by bringing the money into court, is essential to a good plea of tender. (*Hume v. Peploe*, 8 East., 168; *Giles v. Hartis*, 1 Lord Ray., 254.) But if a

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man make a bond for the payment of a loan of money, and afterwards make a defeasance for the payment of a lesser sum at a day, if the obligor tender the lesser sum at the day, and the obligee refuse it, he shall never have any remedy by law to recover it, because it is no parcel of the sum contained in the obligation. And in this case, in pleading of the tender and refusal, the party shall not be driven to plead that he is yet ready to pay the same, or to render it in court. (Co. Lit., note to § 385.) The same principle was held by the Supreme Court of this State in *Hunter v. Le Conte* (6 Cow., 728), and cases there cited.

No question in reference to the taxes arises in this cause, upon the facts found by the referee. The referee found in favor of the appellants upon the question relating to them; and to his finding in that respect, the plaintiff took no exception. It is not, therefore, to be reviewed in this court.

The judgment appealed from should be reversed, and a new trial ordered, with costs to abide the event.

COMSTOCK, Ch. J. After the suit was commenced to foreclose the mortgage, Cady, who had become the owner of the land, tendered the amount due, with the costs, which being refused, he set up the tender in his answer, in bar of the further maintenance of the action. The only question in the case is, whether a tender, made after a mortgage is due, by the owner of the lands mortgaged, discharges the lien.

Forty years ago, this question was fully determined by the Supreme Court of this State, in the case of *Jackson v. Crafts* (18 John., 110). Mr. Justice WOODWORTH, in delivering the opinion of the court, observed: "From the nature of the interest the mortgagee has, there is no necessity of a reconveyance by him to the mortgagor after the mortgage has been paid. When that is done, the mortgagee has no title remaining in him to convey, and consequently, by our laws, on payment of the money, he is not deemed a trustee, holding the legal estate for the benefit of the mortgagor. The only question, then, is, whether tender and refusal are equivalent to

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payment." Having thus truly stated the relation between mortgagor and mortgagee, according to the law as it was then and has been ever since well settled in this State, he cited some of the early English authorities, holding that a tender of the money due discharged the land from the lien.

Nearly twenty years after this decision was made, the same question again arose concurrently, or nearly so, both in the Court of Chancery and the Supreme Court. The case in each of those courts originated in the same transaction, which was this: In 1828, one Edwards mortgaged land in Buffalo to the Farmers' Fire Insurance and Loan Company in New York. The company foreclosed that mortgage in Chancery in 1833, and at the sale under the foreclosure, Tibbetts, their president, purchased a portion of the lands for the benefit of the company, so that the company was deemed the real purchaser. In 1835 they entered into a written contract with W. T. and Isaac Merritt, whereby they agreed to sell to them the land so purchased, and the Merritts paid a part of the price agreed on. By a clause in the charter of the company, it was declared that when the corporation became the purchaser of any land mortgaged to them, the mortgagor should have the right of redemption of such lands on payment of principal, interest and costs, so long as the same should remain in the hands of the corporation unsold. After the company made the said contract of sale to the Merritts, Edwards, the mortgagor, claiming that the lands in question still remained in the hands of the company unsold, tendered to them the amount of the mortgage debt with interest and costs, and demanded a release or reconveyance of the premises. The tender and release being refused, he brought ejectment against the company in the Supreme Court. (*Edwards v. The Farmers' Fire Insurance and Loan Company*, 21 Wend., 467.) The controversy in Chancery was upon a bill filed by the Merritts to enforce the specific performance of a contract with one Lambert for the exchange of the same lands for other real estate in the city of New York; and the question was, whether they could make title to the said lands in Buffalo. Before filing that bill, the heirs of Tibbetts had conveyed to

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the Merritts in pursuance of the contract of the company; but that conveyance was given after the above mentioned tender. (*Merritt v. Lambert*, 7 Paige, 344.) The question of title in both of these controversies depended on two considerations: First, did the lands remain in the hands of the company unsold, notwithstanding the contract to sell them to the Merritts? Second, if so, then did the tender by the mortgagor discharge the lien of the mortgage?—it being, of course, conceded that, under the said clause in the charter, the right to pay off or redeem the mortgage existed, notwithstanding the foreclosure and purchase by the company. The Chancellor was of opinion that the contract with the Merritts was in effect a sale to them, which cut off all the rights of the mortgagor; in other words, that, by reason of that sale having been made, the saving clause in the charter had no effect. He was also of opinion that if the right to redeem was still left in the mortgagor, a mere tender unaccepted did not discharge the lien.

In giving his views upon the last mentioned question, the Chancellor criticised the opinion of Judge WOODWORTH in *Jackson v. Crafts* (*supra*), for the reason that the English authorities which he referred to related to a tender on the day when the mortgage debt became due. (Bac. Abr., tit. Tender, F.; Co. Lit., 209 b, § 338; 20 Viner, tit. Tender, N., § 4.) On this criticism, I shall make one or two observations. By the ancient common law, a mortgage was a grant of land defeasible on the condition subsequent of paying the money at the exact time specified. (1 Powell on Mortgages, 4.) On failure to perform that condition, the grant was absolute, and neither tender nor payment made afterwards could have the effect to revest the title. The specified time of payment was called the law day, because after default the legal rights of the mortgagor were gone. The estate became vested in the mortgagee absolutely, because the original grant was freed from the condition. "For these reasons," the Chancellor himself remarked, "it is, that the mortgagor, or his assigns, or subsequent incumbrancers upon the mortgaged premises, are driven to a bill to redeem, where the mortgagee refuses to receive what is equitably due

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to him. But this could not be necessary," he added, "if a mere tender of the amount due after the mortgage has become *forfeited* would have the legal effect of discharging the mortgaged premises from the lien of the mortgage." It is a self-evident proposition, which the Chancellor need not have undertaken to prove, that when the law was that even payment after the law day would not discharge the mortgage, a mere tender could not have such an effect. He was probably quite correct in saying that the English authorities cited by Judge WOODWORTH referred to tender at the day, because those authorities were of a date when even payment after the day did not divest the estate or interest of the mortgagee. But Judge WOODWORTH and the eminent men who sat with him on the bench of the Supreme Court considered, what the learned Chancellor seems to have failed to notice, the fundamental change which the law of mortgage had undergone long before the decision in *Jackson v. Crafts* was pronounced. In this State, a mortgage had always been regarded as a mere security or pledge for the debt; and the rule had always been, that payment at any time discharged the lien, so that no reconveyance of the estate was necessary. It seems to me, therefore, that the authorities cited by the Supreme Court, on the effect of tender, were extremely pertinent to the question, because they showed very conclusively that a tender at the law day had the same effect on the mortgage as a payment on that day. Underlying this particular proposition, of course, was the more general doctrine that when a certain effect must be given to a payment, a tender will have a like effect. This was what the Supreme Court undoubtedly meant, and the authorities cited simply showed the application of the principle to the law of mortgage. The principle itself, or its application, was not questioned by the Chancellor; but he did not consider, so far as appears, that the rule had become entirely settled, giving to a payment after the day, and on the day, precisely the same consequences. I think, therefore, with great respect for a jurist so learned and accurate, that he differed from the Supreme Court, and criticised its opinion, without due reflection upon the real ground of the decision.

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I turn now to the controversy which arose concurrently in the Supreme Court, and directly presented the question for the second time in that court. (*Edwards v. The Farmers' Fire Insurance and Loan Company, supra.*) At the trial, the Circuit Judge had ruled in favor of Edwards, the mortgagor, upon both the points above stated. That is to say, he held that, notwithstanding the contract of sale to the Merritts, the lands in question still remained in the hands of the company unsold, and that the tender after the law day extinguished the lien of the mortgage; the foreclosure itself having no contrary effect, according to the express provision of the charter. The plaintiff had a verdict accordingly. A new trial was moved for in the Supreme Court, and denied,—the opinion of the court being delivered by Mr. Justice COWEN, who examined both these questions, and especially the one now presented to us, at great length and with great ability. In the course of the discussion he also spoke of the provision in the charter as an extension of the law day; but to that consideration I think only small importance should be attached, for the charter only extended the “right of redemption,” in other words, the right to pay off the mortgage, leaving the effect of an unaccepted tender to depend, as it did before the foreclosure, upon general principles of law. If the concurrence of Chief Justice NELSON had been placed on this special and narrow ground, undoubtedly he would have so stated. Mr. Justice BRONSON dissented from the conclusion; but whether on the ground that the executory sale to the Merritts had cut off all the rights of the mortgagor, or on the ground that a mere tender does not remove the lien of a mortgage, does not appear.

After a decision so authoritative as that of *Jackson v. Crafts*, and the lapse of nearly twenty years, there being in the intermediate time at least two distinct recognitions of the doctrine in the Supreme Court (5 Wend., 617; 11 *Id.*, 588), this question might well have been regarded as at rest. It sprang, however, into a new existence under the opinion of the Chancellor; and although the Supreme Court, with a new bench of judges, reaffirmed its position after a most elaborate and

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searching examination, the subject was perhaps a suitable one for final adjudication in the tribunal of last resort. The action of ejectment was accordingly carried to the Court for the Correction of Errors, which affirmed the judgment of the Supreme Court. (*Farmers' Fire Insurance and Loan Company v. Edwards*, 26 Wend., 541.) The cause was most fully argued by some of the ablest gentlemen at the bar, and the decision of the court was pronounced beyond all possibility of cavil on the very point now in controversy. The Chancellor, who was a member of the court, and could and did take part in the decision, was for reversal on two grounds, which he stated: 1. That the written contract to sell the premises to the Merritts was a sale within the meaning of the saving clause in the charter of the company. After that contract was made, and a part of the purchase money paid, he thought the lands no longer remained in the hands of the company unsold, so as to authorize the mortgagor to redeem. 2. On the ground that a tender of the mortgage money after default in payment at the day, could not in any case have the effect to extinguish the lien. With the Chancellor concurred seven of the Senators. Senator VERPLANCK delivered an opinion in favor of affirmance, discussing on the other side the same questions and no others. He made no attempt to sustain the decision on the ground that the law day of the mortgage was extended by the charter, in any sense different from a mere continuation of the right to redeem or pay off the debt after the original default and after the foreclosure and sale. No member of the court, on either side of the general question, so much as mentioned that ground of decision; and most manifestly the right to redeem given by the charter, notwithstanding a foreclosure and purchase by the company, could not have, and was not designed to have, the effect of enlarging the contract in respect to the specified time of paying the debt. With Mr. VERPLANCK concurred the President of the Senate and a majority of the Senators. We are bound to say, that the judgment was pronounced on the two propositions discussed in the respective opinions, and it necessarily affirmed both of those propositions. There is no

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other conceivable explanation to the judgment, unless we say that a judicial foreclosure and sale created a new law day of indefinite continuance, after the one appointed in the contract had long since passed; and this we cannot say, because such a position was in itself wholly untenable, and was not even alluded to by any member of the court. No one who will read the case with a little attention, can fail to be satisfied that it was a decision most deliberately pronounced upon the very question now to be determined.

Thus far it would seem that no legal proposition was ever more firmly settled by a course of adjudication, than the one which this case presents. It is somewhat extraordinary, therefore, that there is a further history of the question. In *Arnot v. Post* (6 Hill, 65), the action was ejectment to recover lands which had been mortgaged by Vial to Winans. The plaintiff's title was under a sale upon a judgment recovered against the mortgagor, soon after the giving of the mortgage. The defendant was in possession, and his title was under a sale upon the foreclosure of the mortgage by advertisement according to the Revised Statutes (2 R. S., 546, § 8), which saved the rights of judgment creditors and of other mortgagees from the effect of such sales. The sale on the judgment took place several years after the foreclosure and sale under the mortgage. Arnot, the plaintiff, was the purchaser, and, claiming that his rights were unaffected by the foreclosure, he tendered the amount due on the mortgage with interest and costs, which being refused, he then brought the ejectment. The questions were these: 1. Whether the foreclosure, according to the true interpretation of the statute, cut off the plaintiff entirely, so that he had no rights either at law or in equity. 2. If not, then whether the judgment creditor could sell on his execution so that the purchaser could, in that manner, acquire the title subject to the mortgage, or whether he must go into equity for relief. 3. These points being in his favor, then the only further inquiry was, whether the tender discharged the mortgage. To entitle him to recover in that action, it was necessary that each of these points should be determined in his favor; and they were so

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determined. The opinion was given by Judge BRONSON. Without reëxamining the question on the effect of the tender, he very properly said that the law was fully settled in this State by the series of adjudications which I have mentioned. The case was carried to the Court of Errors, where the judgment was reversed (*Post v. Arnot*, 2 Denio, 344); and the material inquiry now is, whether that decision reversed the rule on the point now under consideration, or unsettled the law which had been so well established. A little attention to the case will show that it did not. The reversal was by a vote of eleven to nine; so that the change of a single vote would have produced a different result. On the argument of the case, the three points above mentioned were urged on behalf of the plaintiff in error. Six of the Senators delivered written or oral opinions in favor of reversal, of whom only two, who did not express their views in writing, placed that conclusion on the single ground that the tender did not discharge the mortgage. The Senator (Mr. PORTER), who delivered the leading opinion in the case, avoided that ground altogether. The other three of the six were for reversal upon that and the other points in the case. The case does not disclose the views of the five members who silently voted for reversal. We have, therefore, no evidence that more than five members of the court out of twenty—the number present and voting—were of opinion that a tender of the money due upon a mortgage, whether made at the time or after it is due, does not extinguish the lien. It is a perfectly just commentary upon the case to say, that it settled no legal proposition whatever, and much less must it be received as unsettling a rule which had become firmly fixed in the jurisprudence of this State.

Such being, as I think, the clear result of the authorities, a renewed discussion of the question may seem to be unnecessary. I cannot help saying, however, that a decision by this court in opposition to the rule laid down in the cases referred to, would introduce into the law of mortgage an inconsistency too plain to escape observation. In the early history of that law, the courts of equity, departing from the letter of the con

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tract, but adhering to the intention of the parties, adopted the just and liberal doctrine that a mortgage was but a pledge or security, always redeemable until foreclosure. The courts of law followed in the same direction. As Lord REDESDALE observed (Mitf., 428): "The distinction between law and equity is never in any country a permanent distinction. Law and equity are in continual progression, and the former is constantly gaining upon the latter. A great part of what is now strict law was formerly considered as equity, and the equitable decisions of this age will unavoidably be ranked under the strict law of the next." Such, preëminently, has been the course of jurisprudence on this subject. The doctrines originating in the courts of equity, respecting the rights of mortgagor and mortgagee, have been incorporated into the code of the common law, so that there is now no difference between the two systems. This has been true in substance for nearly a century past. In *Martin v. Mowlin* (2 Burr., 978), decided by the English King's Bench in 1760, it was held that whatever words in a will would carry the money due upon a mortgage would carry the interest in the land. Lord MANSFIELD said: "A mortgage is a charge upon the land, and whatever would give the money would carry the estate in the land along with it. The estate in the land is the same thing as the money due upon it. It will be liable to debts; it will go to the executor; it will pass by a will not made and executed with the solemnities required by the statute of frauds. The assignment of the debt, or forgiving it, will draw the land after it as a consequence; nay, it would do it though the debt were forgiven only by parol." So, in *The King v. St. Michaels* (Doug., 682), it was said by the same judge, that "a mortgagor in possession gains a settlement, because the mortgagee, notwithstanding the form, has but a chattel, and the mortgage is only a security." To the same effect is *The King v. Edington* (1 East., 288), and such is the uniform tenor of the English authorities. (See 6 Conn., 159.)

In this State, the rules of law and equity in regard to mortgages have never differed in any degree; it being the doctrine

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of both systems that a mortgage is but a personal interest merely. This proposition, in its full length and breadth, was determined in *Runyan v. Mersereau* (11 Johns., 584), where the question arose in the most direct manner, whether the freehold was in the mortgagor or mortgagee. The plaintiff, deriving title under the mortgagor, sued in trespass for cutting timber; the defendant justifying under a license from the mortgagee. It was held that the action was maintainable; the decision being placed explicitly on the ground that the former was the real owner of the land, while the latter had a chattel interest only. So it has been held in repeated decisions, that the mortgagee cannot, in any way, convey, devise, mortgage or incumber the land, while the mortgagor can do all these things; that judgments against a mortgagee, which are a lien on all legal estates, do not affect his interest in the lands mortgaged; that such an interest does not descend to heirs, but goes to the personal representative as a chose in action; that it is not subject to dower or curtesy; that it passes by a parol transfer, and by any transfer of the debt; and, finally, that it is extinguished by payment, or by whatever extinguishes the debt. (8 Johns. Cas., 829; 1 J. R., 590; 4 *Id.*, 42; 7-*Id.*, 278; 15 *Id.*, 819; 6 *Id.*, 290; 2 Paige, 68, 586; 5 Wend., 603; 2 Barb. Ch., 119.)

But it has been said that the mortgagee could maintain ejectment against the mortgagor, until our Revised Statutes abolished that remedy in such a case, and that even since those statutes, the mortgagee, being in possession, may retain it until the debt is paid. All this is true; but it presents no anomaly or inconsistency in the law. The mortgagee's right to bring ejectment, or, being in possession, to defend himself against an ejectment by the mortgagor, is but a right to recover or to retain the possession of the pledge for the purpose of paying the debt. (8 Conn., 163.) Such a right is but the incident of the debt, and has no relation to a title or estate in the lands. Any contract for the possession of lands, however transient or limited, will carry the right to recover that possession; and such was deemed to be the nature and construction of a mort-

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gage, it being considered that the parties intended the possession of the thing hypothecated should go with the contract. Ejectment was not, in fact, a real action at the common law. That remedy, in its origin, was only to recover possession according to some temporary right; and it was only by the use of fictions that the title was at length allowed to be brought into controversy. (3 Bl., 199, 200.) When the legislature, by express enactment, denied this remedy to mortgagees, they undoubtedly supposed they had swept away the only remaining vestige of the ancient rule of the common law which regarded a mortgage as a conveyance of the freehold; yet I see nothing inconsistent or anomalous in allowing the possession, once acquired for the purpose of satisfying the mortgage debt, to be retained until that purpose is accomplished. When that purpose is attained, the possessory right instantly ceases, and the title is, as before, in the mortgagor, without a reconveyance. The notion that a mortgagee's possession, whether before or after default, enlarges his estate, or in any respect changes the simple relation of debtor and creditor between him and his mortgagee, rests upon no foundation. We may call it a just and lawful possession, like the possession of any other pledge; but when its object is accomplished, it is neither just nor lawful for an instant longer.

There are terms of the ancient law which have come down to us, having long survived the principles of which they were the appropriate expression. Thus the words "law day" once, and very expressively, marked the time when all legal rights were lost and gone, by the mortgagor's default. There is now no such time until foreclosure by a judicial sentence or sale under a power. But the term is still in use, serving no other purpose than to engender confusion and uncertainty in minds which derive their conceptions from words rather than things. So we have the terms, "redemption" and "equity of redemption," which belonged to a system of law that gave the legal estate, defeasibly before default and absolutely afterwards, to the mortgagee, and which, while that system prevailed, were descriptive of the mortgagor's right to go into equity, on the

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condition of paying his debt, to redeem a forfeited estate and demand a reconveyance. These descriptive words yet survive, and are in use, although the ideas they once represented have long since become obsolete. Even the word "forfeiture," still so often used, is no longer, in reference to this subject, the expression of any principle, as it once was. There is now no forfeiture of a mortgaged estate. The mortgagor's rights may be foreclosed by a sentence in the courts, or by a sale had in the manner prescribed by the statute law, if he has himself, in the contract, given authority thus to sell; but, until foreclosure, his estate, the day after a default, is exactly what it was the day before. Controversies like the present would cease to arise, if the mere terms of the law were no longer confounded with its principles.

The proposition, that a tender of the money due on a mortgage, made at any time before a foreclosure, discharges the lien, is the logical result of premises which are admitted to be true. These are, that the mortgagor has the same right after as before a default to pay his debt, and so clear his estate from the incumbrance; and that payment being actually made, the lien thereby becomes extinct. We have, then, only to apply an admitted principle in the law of tender, which is, that tender is equivalent to payment as to all things which are incidental and accessory to the debt. The creditor, by refusing to accept, does not forfeit his right to the very thing tendered, but he does lose all collateral benefits or securities. (8 Johns. Cas., 243; 12 J. R., 274; 6 Wend., 22; 6 Cow., 728; *Oggs v. Bernard*, 2 Lord Ray. R., 916.) Thus, after the tender of a money debt, followed by payment into court, interest and costs cannot be recovered. The instantaneous effect is to discharge any collateral lien, as a pledge of goods or the right of distress. It is not denied that the same principle applies to a mortgage, if the tender be made at the very time when the money is due. If the creditor refuses, he justly loses his security. It is impossible to hold otherwise although the tender be made afterwards, unless we also say that the mortgage, which was before a mere security, becomes

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a freehold estate by reason of the default. That this is not true, has been sufficiently shown.

It is said that mortgagees will be put to great inconvenience if at any period, however distant from the time of maturity, they must know the amount of the debt and accept a tender on peril of losing their security. The force of this argument is not perceived. As a tender must be unqualified by any conditions, there can never be any good reason for not accepting the sum offered, whether it be offered when it is due or afterwards. By accepting the tender, the creditor loses nothing and incurs no hazard. If the sum be insufficient, the security remains. It is only by refusing, that any inconvenience can possibly arise. But, whatever may be the consequences of refusal, the creditor may justly charge them to his own folly.

The judgment of the Supreme Court must be reversed, and a new trial granted.

SELDEN, CLERKE, WRIGHT, BACON, and DENIO, Js., concurred; the latter putting his concurrence on the ground that the question was so far determined by authority in this State, that it would now be indiscreet to reexamine it in the light of reason and the analogies of the law.

WELLES, J. (Dissenting.) The only question involved in the case is, whether the tender made by the defendant Cady, under the circumstances, was effectual to extricate the premises in question from the lien created by the mortgage of Blunt to Miller. This tender was made after the day provided in the bond and mortgage for the payment of the money, which is called *the law day*. If the sum tendered was sufficient in amount, and was made to the proper person, the question is reduced to the single point whether the lien of a mortgage is, *ipso facto*, discharged by a tender of the amount due made after the law day; because, if it is, there is no necessity, in an answer setting it up, of the allegation of *tout temps prist*, or of any evidence to show that the tender has been kept good, neither of which is contained in the present case; but the defendant

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relies solely upon the fact of a tender and refusal as equivalent to payment, for the purpose of extinguishing the lien of the mortgage.

If a tender has the effect in any case to release the lien, it produces that effect the moment it is made, whether accepted or refused. If accepted, it is a payment; if refused, it is the folly of the holder of the mortgage, and the lien is gone and cannot be restored by his subsequent change of mind and offer to receive the money tendered. This must be so; otherwise, the tender would not discharge the lien. It is quite different from the case of an ordinary plea of tender at common law, for the purpose of stopping interest and preventing costs, in an action for money due on contract, in which the plea must contain the averment of *tout temps prist*, and where a replication of a subsequent demand, before suit, of the money tendered, and refusal by the defendant, would be a good answer to the plea.

In the case of a mortgage which is collateral to the debt, it is agreed that a tender may be made by the person owning the equity of redemption, which will extinguish the lien of the mortgage forever, without affecting the debt. The primary object of a foreclosure suit is to enforce the lien, and if that is met by a sufficient tender, the cause of action is gone and cannot be restored by a subsequent demand and refusal. It is important, therefore, to consider whether the tender in the present case, being made after the law day, if good in other respects, had the effect to discharge the lien of the mortgage.

In the case of *Jackson v. Crafts* (18 Johns. R., 110), it was decided that the tender in that case, which had been made long after the time appointed in the mortgage, had the effect to discharge the land from the lien of the mortgage. The question of the time when the tender was made, does not appear to have been raised; nor does the distinction between a tender made on the day, and one made afterwards, appear to have been considered by the court. The authorities cited and relied upon by Judge WOODWORTH, who delivered the opinion of the court, are, Bacon's Abridgement, title Tender (F.); Coke on Littleton,

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209 b, section 338; *Id.*, 207 a, section 335; and 20 Viner, title Tender, n, section 4. These authorities establish the principle that a tender at the time and place, according to the condition of the mortgage, will discharge the lien. They prove nothing more, as is clearly shown by the Chancellor, in *Merritt v. Lambert* (7 Paige, 344), and by Senator JOHNSON, in *Post v. Arnot* (2 Denio, 344-357). The passages referred to in Coke on Littleton will be found in Thomas' edition, volume 2, pages 58 and 60.

In *Merritt v. Lambert* (*supra*), the Chancellor says: "The correct principle, as intended to be laid down by Littleton and Coke, is, that if there is a tender of the mortgage money at the time and in the manner prescribed in the condition of the mortgage, and the mortgagee refuses to receive it, the condition is complied with; and the estate reverts back to the mortgagor by the express terms of the instrument. So that if the mortgagee is so unwise as to refuse his money when it is tendered at the time and place and in the manner prescribed in the instrument itself, he necessarily must lose his security upon the land, which was merely collateral to the debt; although the mortgagor may still be liable for the money, where there is an existing indebtedness. But if the money is not paid by the day, the condition on which the land was to revert to the mortgagor has not been complied with; and the interest of the mortgagor in the land is then reduced to a mere equity of redemption, and an actual payment, not a mere tender, then becomes necessary to discharge the legal and equitable lien of the mortgage upon the land." In the *Farmers' Fire Insurance and Loan Company v. Edwards*, in the Court of Errors (26 Wend. R., 541-554), VERPLANCK, Senator, says that the ancient common law doctrine, as thus stated by the Chancellor in *Merritt v. Lambert*, is undoubtedly stated with precision. They both agree that the authorities cited by Judge WOODWORTH, in *Jackson v. Crafts*, were inaccurately applied to a case of payment after the day.

The next case, in order of time, in our own courts, to that of *Jackson v. Crafts*, upon this question—if, indeed, that case can

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fairly be regarded an authority upon the question—is *Merritt v. Lambert* (*supra*), where the Chancellor held the doctrine contained in the above extract from his opinion to be still the law in this State.

Afterwards came the case of *Edwards v. The Farmers' Fire Insurance and Loan Company* (21 Wend., 467), which was an action of ejectment tried at the Erie Circuit in July, 1837. The action was brought to recover certain premises which had been mortgaged by the plaintiff to the defendants as security for a loan, and which had been bought in by the defendants at a master's sale in pursuance of a decree of foreclosure of such mortgage, and duly conveyed to them by the master; and, subsequently, the plaintiff had tendered to the defendants the full amount of the moneys due upon the mortgage and the costs of foreclosure, which the defendants refused to receive, whereby the plaintiff contended, under the circumstances of the case, that he had become entitled to be restored to the possession of the premises. The plaintiff recovered a verdict, which the defendants moved to set aside and for a new trial. The motion was denied by the Supreme Court in July, 1839.

It is important to state, that the act incorporating the defendants (Laws of 1822, ch. 50, p. 42, &c.), the second section of which authorizes the company to loan money on bond and mortgage, provides in the third section, among other things, "that, in all cases where the said corporation have become the purchasers of any real estate on which they have made loans, the mortgagors shall have the right of redemption of any such property on payment of the principal and interest and costs, so long as it remains in the hands of the corporation unsold."

The opinion of the court was delivered by Justice COWEN, who, after disposing of some preliminary questions in favor of the plaintiff, proceeds to say: "Then, what were the plaintiff's rights, as declared by this charter? I answer, that he had a legal statute right to redeem, so long as the property remained in the defendants' hands unsold; and this, notwithstanding the decree of foreclosure. I will put it that the defendants had made a legal and valid stipulation in their mortgage, that the

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plaintiff might so redeem; for the charter shall be read as a part of their mortgage." The learned justice was willing to rest his decision upon that statement of the plaintiff's rights; regarding the statute as a part of the contract contained in the mortgage, by which the defendants agreed to receive the money whenever offered by the plaintiff, provided they had not sold the mortgaged premises, and that the law day continued as long as the premises remained in the hands of the defendants unsold. All that he says afterwards, is in answer to the objections by the defendants' counsel, that the law day was passed when the tender was made, and for that reason it gave the plaintiff no right of possession, &c.; in which he attempts to show, that, assuming the tender to have been after the day, yet that it was as effectual for the purpose of working a release of the lien of the mortgage as if made on the day, and that the ancient common law rule on the subject was necessarily abrogated or modified by the change which had been wrought in the character of mortgages by modern legislation and adjudication. He came to the conclusion that a new trial should be denied. The case states that the Chief Justice (NELSON) concurred in that conclusion, and Mr. Justice BRONSON dissented. The case does not show that the court decided anything on the particular question under consideration. All that was decided was, that a new trial should be denied. Upon which of the two grounds stated by Judge COWEN the Chief Justice placed his concurrence, or whether upon both, does not appear. If he regarded the clause in the defendants' charter above referred to as an extension of the law day or of the time appointed by the parties within which the plaintiff was at liberty to pay, &c., he must necessarily have concurred in the conclusion arrived at by Judge COWEN, whatever his views might have been on the other question. Nor does it appear upon what ground Judge BRONSON dissented. Excepting for the fact that there were other questions in the case, he must have differed from Judge COWEN upon both the grounds upon which he thought the action might be sustained; for if he thought either was tenable, he could not have dissented. So that it may well be, that

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in the decision of the case a majority of the judges entertained the opinion that a tender after the day does not, *per se*, discharge the lien of a mortgage. The case was afterwards taken to the Court of Errors, where the judgment of the Supreme Court was affirmed by a vote of eleven to nine. (26 Wend., 541.) Two opinions were written upon that decision; one by the Chancellor, for reversal, in which he adheres to his views upon the effect of a tender after the day as expressed in *Merritt v. Lambert*, and the other by Senator VERPLANCK, for affirmance, in which he expresses his full concurrence in all the views and positions of Judge COWEN in the same case in the Supreme Court. The case does not show upon what grounds any of the members of the court, except the Chancellor and Senator VERPLANCK, based their decisions. All the votes for affirmance, except Senator VERPLANCK's, might well have been on the ground stated by Judge COWEN in the court below. We see, therefore, that the case is no authority upon the precise question which we are called upon to decide in the case at bar.

The case of *Arnot v. Post and others* (2 Denio, 844), comes nearest to deciding the precise point now before us of any of the cases in this State, excepting those of *Jackson v. Crafts*, in the 18th of Johnson; and *Merritt v. Lambert*, in the 7th of Paige.

Arnot v. Post was an action of ejectment, tried at the Circuit in Chemung county, in May, 1843. The defendants were in possession of the premises as tenants of Simeon Benjamin, whose title was that of a purchaser at a foreclosure sale by advertisement under the statute, by virtue of a power of sale contained in a mortgage given by Joseph Vial and Uriah Smith, dated May 1, 1827, of which mortgage Benjamin was the assignee at and before the time of the foreclosure and sale. The purchase by Benjamin at the foreclosure sale was on the 23d of August, 1830. The money secured by the mortgage was all due in April, 1828.

Arnot, the plaintiff, claimed title by virtue of a purchase by him of the premises in question at a sale thereof by the sheriff on an execution issued upon a judgment against Vial and two

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others, docketed August 6, 1827, and a deed from the sheriff in pursuance thereof. On the 21st of September, 1838, and after the deed from the sheriff to the plaintiff, which was dated in May, 1838, the latter tendered to Benjamin the principal and interest due on the mortgage, with the costs of the foreclosure, which Benjamin refused to receive. The Circuit Judge decided that the tender discharged the lien of the mortgage, and that the plaintiff was entitled to recover. The Supreme Court, in October, 1848, denied a motion for a new trial, and ordered judgment for the plaintiff.

In delivering the opinion of the court, BRONSON, Ch. J., takes the ground that the plaintiff was not affected in any respect by the statute foreclosure and sale to Benjamin; that the statute in force at the time of the foreclosure sale (2 R. S., 546, § 8), declared that subsequent mortgagees and judgment creditors should not be prejudiced by any such sale, nor should their rights or interests be in any way affected thereby; and that, therefore, the tender should have the same effect as if no such foreclosure had ever been had. In this, it seems to me, he was clearly right. As to Arnot, the judgment creditor, there had been no foreclosure. The Chief Justice then says: "It has always been held, that a tender at the day discharged the lien of the mortgage; and although a clear departure from the old law, it is fully settled in this State that a tender after the day will have the same effect." For this, he cites *Jackson v. Crafts*, and *Edwards v. The Farmers' Loan and Insurance Company* (*supra*). He admits that in the last case the law day was extended by the charter of the company, but contends that the broad principle was asserted, that a tender any time before foreclosure, although the law day had passed, would have the effect of discharging the lien of the mortgage.

I think I have shown, that, although the principle was asserted in the case, by COWEN, J., in the Supreme Court, and by VERPLANCK, Senator, in the Court of Errors, yet that the contrary was as broadly asserted, and that the case proves nothing with certainty on either side of the question.

This case of *Arnot v. Post*, which we are now reviewing,

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was afterwards taken to the Court of Errors, where the judgment of the Supreme Court was reversed by a vote of eleven to nine. Upon the decision in the Court of Errors, seven written and two oral opinions were delivered. They were by Senators HARD, PORTER, JOHNSON, SEDGWICK, BOCKEE and CLARK for reversal, and the President of the Senate and Senators TALCOTT and LESTER for affirmance. Senator TALCOTT and the President put their decisions upon the same grounds as stated by the Supreme Court. The report of the case states that Senator LESTER delivered a written opinion in favor of affirmance, but upon what ground does not appear. It is presumed to have been the same as that of the Supreme Court, as I cannot conceive of any other.

Senator HARD, in his opinion, discusses the question whether the old rule, which requires a tender to be made on the law day in order to discharge the lien, was still the law of this State. He regards the authorities as somewhat conflicting, and the rule adopted by the Supreme Court of very questionable authority, and thinks the judgment of that Court not sustained by the cases referred to by Chief Justice BRONSON. His conclusion, as I understand, is, that where the tender is after the day, the only remedy of the owner of the equity of redemption is by a bill to redeem.

Senator PORTER makes no allusion in his opinion to the distinction between a tender before and one made after the law day as to its effect upon the lien of the mortgage, but places his decision upon the grounds that, under the particular circumstances of the case, the plaintiff's remedy, if he had any, was by a bill to redeem. JOHNSON, Senator, holds that an unaccepted tender after the day does not, *per se*, in any case discharge the lien of a mortgage. Senators SEDGWICK, BOCKEE, and CLARK concurred in the views of Senator JOHNSON.

I admit that this case, which I believe is the latest one on the subject in this State, does not prove conclusively that the admitted rule of the common law before repeatedly referred to is still the law of this State; yet its strong tendency is that way. In view of all our reported cases on the subject, the

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most that can be said against it is, that it is at this day an open as well as a vexed question. The Court of Chancery has persistently adhered to it, as it was found to exist at the formation of the Government; and the Supreme Court has as strenuously insisted upon applying the same rule to the case of a tender after the day as all agree exists when the tender is made at the day.

My own opinion is, after a careful examination of the cases, that the weight of authority is in favor of the rule as it existed at the common law. If that rule has not been abrogated or modified, all will admit that it is the plain duty of the courts to follow and enforce it. Clearly there is no *stare decisis* in our way. It is of importance that the rule be definitely settled, and its boundaries defined. Before we hold a rule different from what we find it settled by the common law, we should require evidence that the rule has been changed by competent authority, either expressly or by necessary implication.

This evidence, the advocates of the change of the rule claim, is found in the changed character of a mortgage upon land, in consequence of various legislative enactments. We are told that when the rule of the common law in question was adopted, a mortgage conveyed a conditional estate in the premises, which entitled the mortgagee to possession, and upon which he could maintain ejectment; and that a mortgage does not now pass any estate in the land, but is merely the creation of a specific lien as security for the payment of a debt or the performance of a duty; and that the statute has taken away the right of the mortgagee to maintain ejectment. All this is true; and doubtless other shades of difference may be found between the legal effect of a mortgage at common law and as it now exists. But they will be found to relate to the remedy, or to consist in collateral or incidental circumstances. Mortgages are substantially what they always were. The fact that they are not now regarded as transferring the freehold, but are merely specific liens, is altogether theoretical and ideal, so far as respects the question under consideration. The great object of these instruments is the same now as it always was—that of security for the payment of money or the performance of a duty. A mort-

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gagee in possession is now, as always heretofore, accountable for rents and profits, and he may still defend his possession with the mortgage the same as ever. I know of no difference between the right of the mortgagor, or the person owning the equity of redemption, to redeem the premises from the lien of the mortgage, as that right now exists, and as it existed in the time of Coke or Littleton. That right is governed now by substantially the same rules as then.

The rule contended for by the plaintiff is reasonable, convenient and just. In the first place, the parties to the mortgage have, by agreement, fixed upon the time of payment and if the mortgagor fulfills his agreement by paying on the day appointed, or tendering payment on that day, the lien is discharged. The parties are then to be ready, the mortgagor to pay, and the mortgagee to receive. If the former performs his duty, or tenders performance, and the latter refuses, his lien is gone forever; he has no excuse for his folly, and is entitled to no consideration for the loss of his lien. On the law day, each party is presumed to know exactly what his duty is, and the amount the mortgagor is bound to pay and the mortgagee entitled to receive.

If the mortgagor allows the law day to pass without payment or tender, he then is a defaulter. If he can discharge the lien by a tender of payment the next day, there is no reason why he may not do the same by a tender after the lapse of one year or of ten years.

Suppose the mortgagee goes into possession under the mortgage, by consent of the mortgagor, immediately upon default of payment, and the latter takes no steps towards payment for years after; what amount shall he tender when he gets ready for payment? what abatement from the principal and interest shall be made for mesne profits? Shall the defaulting mortgagor be permitted to select his own time, and then make a tender of such an amount as he shall deem proper, and the mortgagee be bound to accept it in full, at the peril of losing his lien forever?

Suppose again the case of a defaulting mortgagor, who claims

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to have made partial payments, or to be entitled to a set-off, about which he and the mortgagee in good faith differ: according to the rule claimed by the defendant, he must accept in full the amount tendered at the peril of losing his lien, provided, upon a litigation, it shall be adjudged that the tender was sufficient in amount. It seems to me that the old rule is the only just and wholesome one that can be recognized. It is quite as favorable to the mortgagor as he can in reason ask. If he makes a sufficient tender after the day and before an action is brought to foreclose the mortgage, let him keep the tender good, and, when he is sued, let him set it up as a defence, bring the money into court and offer payment as in other cases, and the court will, in such a case, decree the mortgage satisfied and discharged, and adjudge costs against the plaintiff. Or if for any reason the mortgagor, or the person whose duty or interest it may be to have the lien discharged, does not wish to wait the mortgagee's time for foreclosing, let him make his tender and keep it good, and then bring his action to redeem, alleging the tender and offering to pay; and if, upon the trial, it is found that his tender was sufficient and the plaintiff was ready to pay, the court would give him all the relief which equity and justice required. In all these cases, the mortgagee would have the right to have the disputed questions adjudicated, without losing his lien for the amount in equity and justice due to him.

The rule contended for by the defendant would, in many cases, operate as a bounty to negligent and defaulting debtors, and mortgagees would, under its workings, be induced to purchase their peace at an unjust sacrifice of their rights.

For the foregoing reasons, I am of the opinion that the rule of Littleton, as expounded by Coke, and as, all now admit, was the rule of the common law in relation to the effect of a tender after the law day, is still the law of this State; and as the tender in this case has not been kept good, and the defendant's answer contains no offer of payment, and the facts found by the court before whom the cause was tried do not show that the tender has in any sense been kept good, or that the defend-

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ant was ready to pay, &c., I think that he can have no benefit by reason of it; and that the judgment should be affirmed, with costs.

Judgment reversed.

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Where the actual navigation and discipline of a vessel are entrusted by the owner to a competent sailing master, the implied warranty of seaworthiness, in this respect, is satisfied, although another person, having no nautical skill, and who, in fact, acted only as supercargo, is named in the ship's register as master.

The authority of master is vested in that person to whom it has been actually delegated by the owner. The registry is *prima facie* evidence on that subject, but not conclusive.

The effect of the act of Congress in relation to the registry of vessels is only to confine the benefits of an authenticated national character to such vessels as are registered in conformity to its terms. It has, of itself, no effect upon a contract of insurance, or the question of seaworthiness arising under it.

APPEAL from the Superior Court of the city of New York. Action upon a policy of marine insurance upon the steamer Albatross, for a voyage from New York to Vera Cruz and back. The defence was, that the vessel was unseaworthy, in not having a competent or skillful commander and captain. Upon the trial it was proved that, for a year or more previous to March 30, 1853, the Albatross, a vessel of American build, had been owned by British subjects, and sailed under the British flag. Captain McNeil was her first mate and master. His character as a skillful and experienced seaman and navigator was not disputed. Shortly previous to March 30, 1853, the Albatross, under the command of Captain McNeil, returned to the city of New York from a trip to Vera Cruz. She had then become the property of the plaintiff, who put her up for another

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voyage to Vera Cruz. He had made arrangements with one Greene to go in her as purser, having charge of the money affairs of the ship—Captain McNeil continuing her master. Greene had never been to sea, and had no nautical skill or knowledge. A few hours before the ship was to sail, the plaintiff, being about to take out a new register, and learning that McNeil was not an American citizen, determined to put Greene into the register as master. The register was taken out accordingly, and the shipping articles of the crew were signed by Greene, as also the master's bond to the collector of customs for the return of seamen. The plaintiff delivered to Greene written instructions, stating the reason why his name had been inserted in the register as master, and directing him to take charge of the financial affairs of the vessel, but that McNeil was to have the whole charge of the navigation of the ship. McNeil and Greene acted respectively in accordance with these instructions during the voyage. The latter testified that he supposed McNeil and himself were the only persons on the ship who knew that he was named as master in the register. His testimony and that of McNeil is stated in the following opinion. The ship sailed on the 1st April, 1853, and on the 19th of the same month was wrecked upon a coral reef about sixty miles from Vera Cruz.

The judge charged the jury that if they should find that, when the vessel left the port of New York, Greene, the master named in the register, and who went in the vessel as master, was not possessed of nautical skill and experience, the defendant was entitled to a verdict, although the plaintiff engaged for the voyage and placed on board McNeil to navigate the vessel, and he was fully competent for that purpose. The plaintiff took an exception. The verdict was for the defendant. The exception having been argued at general term, and judgment there ordered for the defendant, the plaintiff appealed to this court.

William M. Evarts, for the appellant.

Francis B. Cutting, for the respondent.

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WELLES, J. In a marine insurance, the assured is understood to warrant that, at the commencement of the voyage, the ship is seaworthy. Among other things necessary to constitute seaworthiness, it is requisite that the ship should have a competent master and officers, according to the service upon which she is employed. But the law in relation to seaworthiness does not require that the master or any of the subordinate officers or crew should be a citizen or citizens of the United States, nor that the ship itself should be registered in pursuance of the acts of Congress. I am not aware of any law which prohibits a ship-owner from sailing his vessel from any port in the United States to any other in the world, without a register. An insurance upon the vessel or cargo for any such voyage would be valid, if there was no objection but its non-registry. The object of the register is to secure certain advantages to the ship, its owner and company, which would be lost by neglecting it. But there is no law requiring it to be done, and no penalty is incurred by such neglect, excepting the loss of the advantages attendant upon the registry.

It is, nevertheless, of the first importance to the insurer and insured, that the ship be sufficiently officered and manned; and as the insurer cannot control the owner in that respect, the latter undertakes that it shall be done; not indeed in terms, but the law attaches the undertaking, by implication, to the contract of insurance, as an indispensable quality of seaworthiness.

That the ship, when she commences her voyage, shall be put in charge and under the command of a person of competent nautical skill and experience as sailing master, is a condition precedent to any liability of the insurer, growing out of the contract of insurance. It is no part of the contract, however, that the name of the acting master should appear in the register of the ship, in case a register is effected, nor that the actual sailing master should be a citizen of the United States. If the owner chooses to register the ship in the name of a person as master who has no nautical skill or experience, when in fact he never intended he should act as master, or take any part in navigating the ship or any control of the subordinate

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officers or mariners, it is a matter with which the insurer has nothing to do; provided always the ship is actually put under the command of a competent master.

The decision of the Superior Court in this case was placed mainly upon the ground that Greene is to be regarded as master of the Albatross upon the voyage in question; and that, although the vessel was in fact navigated by McNeil, yet there was an absence of authority in him to enforce the discipline and secure the obedience to his commands among the subordinate officers and crew which an emergency, involving the safety of the vessel or cargo, might render indispensable. Assuming such absence of authority in McNeil, I am not prepared to deny the conclusion to which the learned court has arrived. But I cannot assent to the correctness of the premises from which the conclusion is derived. The owner most assuredly had the right to appoint and employ whomsoever he chose to command the vessel and act as captain or master, in the full sense which those terms import, and to be at the head of the discipline of the subordinate officers and crew, clothed with all the authority which such position implies.

In this case, the vessel was registered in the name of Greene as master, who was confessedly a mere landsman, with no nautical skill or experience whatever. The evidence shows that he, in fact, took no part in navigating the vessel, but that he entered upon the voyage, and continued until the ship was lost, in the character of purser and agent of the owner, and absolutely subject to McNeil, the master in fact, in all matters pertaining to the navigation and government of the vessel. He testified that he was employed by the plaintiff, the owner of the Albatross, as purser on board of her on her last trip from New York to Vera Cruz, on which trip she was lost; that his duties were to take charge of the money affairs of the ship, to collect the bills for freight and passage, and to pay bills on account of the ship; that McNeil had charge of the navigation of the ship; that the first he heard of his being in the ship's register as captain, was three or four hours before the advertised hour for sailing; that during the voyage he took no part

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in the command or control of the vessel; that McNeil acted as master in the navigation and discipline of the vessel; that he (Greene) was not known or called captain on board of the vessel; that McNeil was the only person on board that knew that he the witness was named in the register; that he had written instructions from the plaintiff as to his duties on board the vessel in the shape of a letter from the plaintiff to the witness, which letter was in his trunk on the Albatross when she was lost, and went down with it; that the instructions were that he, the witness, was to take charge of the financial affairs of the ship; and that McNeil was to have the whole charge of the navigation of the ship.

McNeil testified that Greene, from the time they left New York until they struck, did nothing about the ship any more than a passenger; that he was unwell the whole time, and a part of the time confined to his bed; that he, the witness, sailed the vessel under Greene's direction, that is, wherever Greene told him to take the ship he took it, and remained as long as he told him; that Greene acted on board as the owner or supercargo of the ship; that he had no control, and attempted none, as to the sailing of the ship or its management at sea. It appears also, by the evidence of McNeil, that on the occasion of the disaster he exercised the entire command of the vessel and crew, and that Greene gave no directions, that he was just like any of the passengers, and that he (McNeil) did not consult with him as to what should be done. There is nothing in the evidence to controvert these facts, as testified to by Greene and McNeil; and the same facts are strongly corroborated by other evidence.

The court charged the jury that, if they should find that Greene was not possessed of nautical skill and experience, the defendant was entitled to their verdict, although the plaintiff may have engaged for the voyage and placed on board McNeil, and he was possessed of the requisite skill and experience, and was fully competent for that purpose. This was equivalent, under the evidence, to a direction to the jury to

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find for the defendant, as no one pretended or claimed that Greene had any such skill or experience.

The case, then, is one where the owner placed the ship in the charge and command of a competent sailing master, clothed with all the authority incidental to that position, and who accordingly took possession of the ship for the voyage, and exercised all the authority throughout the voyage as long as it lasted as such master: that the ship was registered in the name of another person as master, who possessed no nautical skill or experience, and who never possessed any authority whatever as such master, but who embarked upon the voyage in the character of purser and supercargo, with no authority but such as appertained to such character, and with instructions from the owner to treat and regard the other as the actual master and commander of the ship during the voyage.

The fact that the Albatross was registered in the name of Greene as master, is only to be regarded as evidence tending to prove that he was in fact such master. It is not conclusive of his relation to the ship, but at most only *prima facie*, and liable to be overcome by other evidence. The evidence, taken altogether, shows clearly and indisputably that it was never intended, either by the plaintiff or Greene, that the latter should have or exercise the least particle of authority in the ship as sailing master, or any authority whatsoever, excepting such as was connected with his position of purser and supercargo. Any other hypothesis is simply absurd. No one but a madman would entrust the navigation of a vessel, on such a voyage, to such a man as Greene admits himself to have been.

I am constrained, therefore, to the conclusion, that as the ship was put in possession of a competent master, and the voyage prosecuted by him as such, that the fact that the name of another person, who had not the requisite skill or experience for that purpose, was put in the register as master, does not affect the question of seaworthiness of the ship. Suppose, in this case, Greene had not gone on the voyage at all: it is not perceived how that fact could affect the question under consideration. Most clearly, the owner might have engaged

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another person to go as master; and that is substantially this case. Greene did not go as master, but did go in another capacity, which, for the purposes of the present question, is the same as if he had not gone at all. Or suppose, when the plaintiff procured the vessel to be registered, he believed Greene to be in all respects competent and qualified to act as master, but afterwards, and before the vessel sailed, discovered he was incompetent, and thereupon McNeil was engaged and went as master: I apprehend it could not be denied, in such case, that the latter should be regarded, to all intents and purposes, the master and commander, as effectually as if his name had been in the register as master.

The policy in this case contemplates the right of the owner to change the master before the voyage should commence. It describes the vessel insured as follows: "Upon the body, tackle, apparel and other furniture of the good steamer called the Albatross, whereof is at present master, or whoever else shall go for master, in the said vessel," &c. Now, McNeil went for master, and he was confessedly competent. If the defendant intended to insist that no one should go as master on the voyage except a citizen of the United States, and his name put in the register of the ship as such, it should have taken the precaution to have had such a provision in the policy.

For the foregoing reasons, the judgment of the Superior Court should be reversed, and a new trial ordered.

SELDEN, DAVIES, CLERKE, and WRIGHT, Ja., concurred.

COMSTOCK, Ch. J. (Dissenting.) Greene was master of the steamer Albatross for every legal intendment and purpose. He was so described in the register. In that character he signed the shipping articles and the bills of lading. The vessel was also cleared in his name as master. He had, it is true, a letter of instructions from the owner, according to which McNeil, a subordinate, was to take charge of the nautical management of the ship. But, so far as I can see, this letter only affected

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the relations between Greene and his employer. In virtue of those instructions, it no doubt became the duty of Greene to consult and be guided by McNeil upon all questions which concerned merely the navigation of the vessel. But they did not convert the subordinate into the master. Greene had the legal authority which belonged to that office, and McNeil had not. The allegiance of the crew was due to the office, and not to the private instructions, of which they may, or may not, have been entirely ignorant. The relations between master and crew, as established by the maritime law and the acts of Congress, cannot be changed by an interference of this nature. The nature of the service admits of but one supreme authority, and the laws recognize but one. That authority was vested in Greene, in virtue of his office. He alone had the power to compel the obedience of the crew by discipline and punishment, although the directions might be given by another person. (*United States v. Taylor*, 2 Sumner C. C., 584; *Curtis' Rights and Duties of Merchant Seamen*, 4, 5, 7, 15; 1 U. S. Statutes at Large, 1790, ch. 29, § 1; 4 *Id.*, 1835, ch. 40, p. 775.) In a conflict of opinion or command, between Greene, as master, and McNeil, the crew would have been guilty of revolt or mutiny if they had obeyed the latter, and disregarded the authority of the former.

The vessel, then, was not seaworthy, according to the definitions contained in all the authorities. Seaworthiness requires the presence of a master of competent skill. (*Keeler v. The Firemen's Ins. Co.*, 3 Hill, 255; 3 Kent, 287; 1 Arnold on Insurance, 684.) But Greene was totally ignorant of navigation; having, in fact, never before been at sea. McNeil had the required skill; but he had not the legal power of a commander. We may speculate; but we cannot affirm that the perils of the voyage would have been the same, if the requisite skill and authority had been combined in one person. In the contract of marine insurance, seaworthiness is an implied condition, fatal to the policy in its very inception, if the condition be not performed. We think it was not performed in the present case, because the authority of the master existed

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without skill; and the skill of the subordinate was without legal authority. The policy was therefore void.

DENIO and BACON, Js., concurred in this opinion.

Judgment reversed, and new trial ordered.

MILBANK et al. v. DENNISTOUN et al.

Where the instructions of an American owner of flour to his factor at Liverpool were to withhold it from sale until an expected act of Parliament had produced its results upon the market, the latter is not chargeable with a breach of instructions in selling prematurely, if he wait a considerable time after the passage of the act and then sell in good faith and with reasonable prudence.

Under such instructions, the factor has a discretion, after the market has remained a considerable time under the influence of the new law, to judge whether the measure has produced its full effect upon the market; and he is not liable for an error in judgment in that respect.

The evidence being in no respect contradictory, it was error to submit to the jury whether there was a breach of instructions.

APPEAL from the Superior Court of the city of New York. The action was commenced in 1847, to recover damages against the defendants for alleged misconduct in selling a cargo of five thousand barrels of flour, which the plaintiffs had consigned to them as factors for sale at Liverpool. The plaintiffs were merchants in New York, having also a house in New Orleans; and the defendants transacted business in Liverpool, and likewise had a house in the city of New York. The flour was shipped from New Orleans by the N. Biddle, in June, 1846, and arrived at Liverpool on the 18th July following. The plaintiffs obtained an advance from the defendants, through their house in New York, of \$2.25 per barrel on the flour, on delivering the bills of lading indorsed to the defendants. It appeared that, at the time of the shipment, a bill had been introduced into Parliament greatly reducing the duties on

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breadstuffs imported into the United Kingdom, which eventually received the royal assent on the 27th June, and took full effect on the 30th of the same month. It immediately reduced the duty on foreign wheat imported, from eighteen shillings to four shillings per quarter (which was the lowest duty which could be received under that act), and upon imported flour in the same proportion, viz., from ten shillings and ten pence to two shillings and five pence per barrel; and it applied equally to flour which had arrived and been placed in a bonded warehouse before the act took effect, with that which arrived subsequently. The plaintiffs gave in evidence the correspondence between the parties respecting the shipment, from the commencement to the conclusion of the adventure, embracing a good many letters on each side. On the 25th June, the plaintiffs wrote the defendants, advising them of the consignment, but directing them not to dispose of the flour until they should further advise them by a subsequent steamer, the Caledonia, unless twenty-two shillings in bond should be obtainable, at which price they were permitted to sell, if they should consider it for the interest of the plaintiffs. On the 27th June, the plaintiffs wrote the defendants, by the Caledonia, a letter upon which the principal question in the case turns. They inclose invoices of the flour by the N. Biddle, and also of three thousand barrels of other flour sent by another vessel, the Georgianna, and state the particulars of the advance they had received from the defendants' partners in New York, and express confidence that the flour would arrive out in a sweet condition. The letter then proceeds as follows: "When shipping, we had hoped for a better market than the prospect now justifies. We fear the first introductions for consumption may tend to continue low prices, as they will probably be large immediately on the passage of the new bill. Believing that after the stocks now in bond shall have been reduced by consumption, &c., that an improvement may ensue, *we would express our desire that these parcels may be withheld from the market until the operation of the new law shall have produced its results.* We hope we may not err in assuming its passage; though if

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twenty-two shillings in bond is obtainable on arrival, and you think our interest dictates such sale, please so dispose of it."

The defendants received this letter on the 12th July, prior to the arrival of the *N. Biddle*; and upon her arrival, they wrote the plaintiffs that the price mentioned in their letter of the 27th June could not be obtained, and that they thought it probable that after getting a sample of the flour they should have it stored, and should await the arrival of one of the plaintiffs, who was expected to come out to Liverpool very soon. They, however, sold the flour soon afterwards, about half of it on the 4th and the remainder on the 5th and 7th of August, at twenty-one shillings, except one hundred barrels, which brought twenty-one shillings sixpence, free of duty. On the 18th August the defendants wrote the plaintiffs, enclosing a note of the sales of the flour, and saying that they were induced to sell by the continued fine appearance of the season; but that they now regretted having done so, for that on the 11th and 12th instant a great change for the worse had taken place in the weather, and the potatoe crop was completely blighted. They added: "A great change has accordingly taken place in the last five or six days in the corn markets all over the country, and New Orleans flour has risen two shillings per barrel, with every prospect of a further advance, as the advices are daily more decided from every quarter of the country as to the irreparable injury which the potatoe crop has sustained."*

* The failure of the potatoe crop, and the consequent advance in the price of breadstuffs and the famine which ensued, referred to in the testimony in this case, are events forming an interesting chapter in the history of Europe for the years 1846 and 1847. Sir ARTHUR ALISON, in treating of them, uses this language: "We now approach the most awful and memorable catastrophe in modern times; that in which the most appalling destruction of human life took place, the greatest transposition of mankind was induced, and in which the judgments of the Almighty were most visibly executed upon the earth." . . . "The summer [of 1846], which had been warm and genial in the earlier months, became suddenly overcharged with moisture and electricity in the last weeks of August. Heavy rains fell for above a fortnight, accompanied by six violent thunder storms; a peculiarity of the weather which has always been observed in the seasons when the potatoe disease has been remarkably widespread and violent.

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In fact, the market continued to rise, so that the three thousand barrels of flour sent by the *Georgianna*, which arrived out soon after the *N. Biddle*, brought from twenty-eight shillings sixpence to twenty-nine shillings ninepence; the sales having been made from the 26th September to the 19th October. By the end of the year, the operation of the corn laws was suspended in consequence of the famine.

The plaintiffs also gave in evidence the trade circulars which the defendants usually enclosed in their letters, and also the depositions of three witnesses, Parke, Harnett and Goodwin, taken under a commission issued to and executed at Liverpool. The last was a corn broker, and the others were corn factors, doing business at Liverpool. The documents and testimony thus given established the following positions: That in anticipation of the passage of the new corn law, a very large and unusual amount of foreign flour and breadstuffs had accumulated in the commercial ports of the United Kingdom, and particularly at Liverpool, which, for the most part, was held in bond, in the expectation that when the bill became a law it would be admitted at a greatly reduced rate of duty, as was the fact; that when the law took effect, the whole of the accumulation was discharged from bond by the payment of the new duty, and that it, together with the fresh arrivals, were thrown upon the market; that during the same time, and until after the sale of the plaintiffs' flour, the season in England for the growth and harvesting of domestic wheat had been fine, and that the crop promised a full yield; that the plaintiffs' flour was sour and heated when it arrived (as was generally the case with flour arriving at that season of the year from New Or-

The work of destruction was fearfully rapid; in one or two nights it was complete, and a blooming crop was converted into a noisome mass of putrefaction. The consequences were disastrous in the extreme, not only in Ireland, but in most parts of Great Britain." . . . "Often in a single night, or at most in two or three days, entire fields of this crop became a mass of putrefaction, accompanied by a most noisome smell which was felt at a long distance round."—*History of Europe from the Fall of Napoleon, &c.*, vol. IV, ch. 43.

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leans), and was not fit for baking, and would have deteriorated by holding; that it was sold at the best price which could be obtained at the time it was sold, and that the sales were *bona fide* and upon the usual credit; that the defendants, on the 6th August, sold three thousand barrels of their own flour at twenty shillings per barrel; that from the time of the passage of the new corn law until after the sale of the plaintiffs' flour, the demand for flour from the country was large, and was freely met by the large holders of flour in warehouses, as well as by those holding the flour which continued to arrive from abroad, and the stocks were rapidly reduced by consumption, but there were no purchasers of flour on speculation; that after the sale of the plaintiffs' flour, and near the middle of August, the weather in England became wet and unfavorable for the harvest, and at the same time the potatoe blight universally prevailed, and that these causes began to produce an effect upon the market for flour at Liverpool from the 16th to the 20th August; that from the 18th July, when the N. Biddle arrived, to the time of the sale of the plaintiffs' flour, the market price for flour at Liverpool was nearly stationary, but rather tended to a decline; that the expectation was that prices would continue low, and that there was no prospect of a rise. The witnesses all expressed the opinion that the improvement in the flour market after the middle of August was not owing to the passage of the new corn law, but was principally attributable to the potatoe blight, and in some measure to the bad weather and to a foreign demand for breadstuffs which had sprung up, and which last, they said, was an unusual occurrence. The bad weather was only temporary, the domestic harvest of wheat eventually proving good.

The defendants' counsel moved for a nonsuit, on the ground, among others, that the evidence did not establish that they had violated instructions, nor that the sales made by them were not the exercise of a fair and honest judgment upon the condition and prospects of the market. The motion was denied, and the defendants' counsel excepted. The defendants then gave in evidence the deposition of John King, their book-keeper, cor-

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roborating, as far as it went, the depositions of the other witnesses, and again moved for a nonsuit, and excepted to the decision by which the motion was denied.

The judge submitted the case to the jury, advising them, in substance, that the questions for their determination were, whether the defendants had violated the instructions contained in the letter of the 27th June, or, if they should find against the plaintiffs on that point, then whether they had failed to exercise that care and diligence which a prudent consignee, acting on his own account and with the knowledge or information which the evidence showed they possessed, would have exercised. As to the instructions, he advised them that the obvious meaning of the letter was, that the flour was to be withheld from the market until the operation of the new law should have produced its results in view of the effect produced as well by a reduction of the stock then in bond by consumption, &c., as by the introduction of large quantities into the market by means of the duty being diminished; and he stated to them that the question was, whether the defendants sold without waiting until in the exercise of good faith they might have supposed and believed, upon the information which the evidence showed they had, that the operation of the law had produced its results in the sense which he had before stated; that if they had so sold, the plaintiffs were entitled to recover; that if, in selling at the time they did, they sold before the stock in bond had been introduced into the market and had been reduced by consumption, &c., they sold before they were authorized to sell, and were liable for the consequences of that act. He also instructed them upon the measure of damages, in case they should give a verdict for the plaintiffs. The defendants' counsel excepted to the several propositions of the charge so far as they were adverse to them. At the conclusion of the charge, the judge submitted to the jury two interrogatories to be answered by their verdict, viz.: 1. "Did the defendants sell the five thousand barrels of flour before the stock of grain in bond at the time the law referred to in the letter of 27th June had been introduced into the market and had been reduced

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by consumption?" 2. Did the defendants, in selling the flour at the time they did, fail to exercise that care and diligence which prudent consignees, having the information which the defendants then had, and acting on their own account, would exercise?

The jury answered each of the questions in the affirmative, and also gave their verdict generally in favor of the plaintiffs, assessing the damages at \$7,829.62. The judgment being affirmed at general term, the defendants appealed.

Francis B. Cutting, for the appellants.

James T. Brady, for the respondents.

DENIO, J. The case turns very much upon what is to be considered the true meaning of the letter of June 27, 1846. In that letter, the defendants expressed their desire that the cargo of flour in question should be withheld from the market until the operation of the new corn law should have produced its results. The direct effect of the law was greatly to reduce the duty upon wheat and flour imported into the United Kingdom. Its operation upon the owners of flour then lying in bond at the British ports, and of such as should thereafter arrive, would be to give them a more advantageous competition with the holders of domestic flour by the amount of reduction of the duty. If they sold their flour free of duty, or, in other words, if they paid the duty themselves, they could sell at a smaller nominal price in consequence of the reduction of the duties and yet realize larger profits on the sales. The price of domestic flour must always be a material element in determining the market of the imported article, as the two classes of produce immediately come into competition in the English markets. The revenue duties may be looked upon as parcel of the expenses of the foreign shipper of flour, and are of the same character, so far as this question is concerned, as freight or insurance. It is for his interest to have them fixed at the lowest rate. Hence the plaintiffs regarded the new law for the

reduction of the duties as a marked advantage in their favor, which they were desirous of realizing the benefit of. But they saw also, what was sufficiently obvious, that this advantage might be neutralized at least, if not more than balanced, by the great accumulation of imported flour remaining in bond and awaiting the new parliamentary measure, which, in the event of its passage, would be released at the anticipated low duties, and thrown upon the market in competition with their own flour taken out by the Nicholas Biddle, and producing what is termed a glut in the market. The object of the instructions of the 27th June plainly was to guard against that state of things. The plaintiffs said to the defendants, in effect, we desire to have the benefit of the new law, which we trust will pass, but we fear that if our flour is sold when the first introductions for consumption take place immediately upon the passage of the bill, we shall lose the advantage. We desire, therefore, that it may be withheld from the market until the operation of the new law shall have produced its results; in other words, we wish to have the benefit of the new law, unqualified by the consequences of the glut in the market which we foresee will take place immediately after its passage. But there were other circumstances which it was foreseen would enter into the state of the market, the most material of which was the approaching harvest in the United Kingdom, which must always have a material influence upon the price of bread-stuffs in the market of that country; as it is well known it has for the same reasons in the markets of countries which export grain. The plaintiffs, therefore, did not direct the defendants to withhold their flour from market for any definite period, which, if they had done, the defendants must have obeyed the direction at their peril, nor did they require that it should be kept out of market until any particular amount of diminution of the stock released from bond should have been realized; but they chose to express their desire in very general terms. They wished their flour to be held until the operation of the new law should have produced its results. This, of course, cast upon the defendants the duty of determining, under all the

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circumstances bearing upon the question, when the period referred to should arrive. This would not depend wholly upon the degree to which the old stock of imported flour should have been reduced, but also upon the prospects of the domestic crop. It was, no doubt, implied that the flour was not to be sold until the stock of imported flour existing when the law should pass should have been materially reduced by consumption, though the direction is not to that effect in terms. It is recited as the belief of the defendants that a reduction would cause an improvement in the market, as it obviously would, if not met by counteracting circumstances. We are to determine, therefore, whether, upon the construction which has been given to the letter, the defendants departed from the instructions contained in it by selling the flour on the 4th August, supposing it had all been sold on that day. The act took effect as a law June 30, and immediately all the flour then in bond was released by the payment of the reduced duties; and that subsequently arriving was entered and the duties at once paid. The holders immediately became free sellers. The demand from consumers was large, and was freely met. These sales were for consumption, not on speculation. They were, therefore, the kind of sales which were referred to in the plaintiffs' instructions. They operated to reduce the stock in bond at the time the act passed; but the evidence does not furnish the means of ascertaining positively the amount of such reduction, or how far it was balanced by fresh importations; though it appears that the quantity on hand continued to be large. While this state of things was going on, the plaintiffs' letter was received on the 12th of July, and about a week afterwards, on the 18th, the vessel with the flour arrived. It should be remembered that when the letter was written, it was not known in New York that the act had passed. In fact, it received the sanction of Parliament on the same day on which the letter was dated. The letter looked to the passage of the act, and not to the arrival of the flour, as the time when the reduction referred to would commence. So far as the plaintiffs know, it might not become a law until after the flour should have arrived.

Indeed, they were not certain that it would become a law at any time. What they chose to forbid (if the letter is to be looked upon as peremptory) was, that their flour should be thrown upon the market in competition with the mass which would be on sale immediately upon the passage of the act. Now, the sale of the first parcel of the flour was made five weeks after that point of time, during all of which interval sales were being constantly made for consumption. In the opinion of the Superior Court at general term, the letter is construed as though the defendants were forbidden to sell until the stock of flour should be reduced, by consumption, after the arrival of the Nicholas Biddle; and it is reasoned that as it was sold soon after that time, it was not withheld from market for any period. The charge, I think, contains the same idea as to the construction of the letter. But, upon that construction, the defendants would be obliged to withhold the flour from market, though, when it arrived, the effect of the law had been fully ascertained. The meaning of the letter plainly is, that the plaintiffs did not wish the flour sold during the existence of the glut which it was anticipated would prevail upon the passage of the act. In my opinion, the defendants were not, on the 4th of August, restrained from selling the flour by the instructions contained in the plaintiffs' letter. The market had been working for five weeks under the influence of the law. The letter had fixed no period for the continuance of the experiment, and the defendants were left to determine whether the time had arrived when it would be for the plaintiffs' interest to have the property disposed of, in the view of all the circumstances of the case. They were, nevertheless, bound to the exercise of good faith and of the prudence and skill which agents to whom the property of others is intrusted are always obliged to employ; and that was the extent of their obligation. That this view is correct, is apparent from the plaintiffs' own letter of July 31. This was written, it will be remembered, four days before the first parcel of flour was sold. In that communication, the plaintiffs say: "We suppose that ere this the crop of wheat has been ascertained as to its probable yield,

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and the grain and flour conformed to such result: we therefore ask you to exercise your discretion in effecting sales for us." As this letter was not received until after the last sales of flour, it cannot be used to dispense with any instructions binding upon the defendants when the sales were made; but it affords evidence that the plaintiffs considered that the result of the English harvest was a material element in determining when the market would have attained the equilibrium which it was supposed would be temporarily disturbed by the large entries for consumption immediately upon the passage of the act. This was precisely the view which the defendants appear to have taken of the case when they made the sales. The grain circular of the 3d of August, which the plaintiffs gave in evidence, described the harvest as progressing favorably and the weather as remarkably fine. Then it was proved affirmatively, on the part of the defendants, that no improvement in the price of flour resulted from the passage of the corn law at any time during the year 1846.

Upon the question whether the defendants had violated their instructions, the burden of proof was upon the plaintiffs. All the material testimony bearing upon the subject was produced by them. There was no question of credibility to be determined by the jury, for the evidence was not in any respect contradictory. Thinking, as I do, that there was no evidence tending to show that the defendants sold the plaintiffs' flour prior to the time when the operation of the new corn law had produced its results, so far as those results affected the price of flour, I think the judge erred in submitting it to the jury to determine whether there had been a breach of instructions.

Upon the second question, whether, laying out of view the alleged instructions, there was evidence upon which the defendants could be charged with a breach of duty in selling the flour at the time they did, and for the price which was obtained, I think there was an equal defect in the evidence. In the first place, it was proved that all the large holders of flour were freely selling at the price which then prevailed, and that the defendants themselves were among the sellers. On the 6th of

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August they sold three thousand barrels of their own flour at a less price than that which they obtained for the plaintiffs'. It was shown that all the indications were in favor of an abundant domestic harvest, and that no immediate improvement in prices was looked for among the dealers in breadstuffs in that market: the prices obtained were the market prices prevailing at the time of the sales, and for some time afterwards. The plaintiffs' flour was a damaged article, and liable to further depreciation if kept on hand. The subsequent extraordinary rise was owing to causes wholly exceptional in their character, which were not so far developed when the sales took place as at all to influence the market, and could not have been anticipated with any degree of sagacity. In looking at the case after the event, we can see that, if the defendants had refrained from selling, the adventure would have resulted quite differently as regards the plaintiffs. They would have realized large gains, instead of having suffered a loss, but it would not have been owing in any degree to the corn law.

It seems plain to me that there was not the slightest reason on the evidence to impute blame to the defendants, and that there was nothing for the jury to deliberate upon. If these views prevail with my brethren, the judgment must be reversed and a new trial ordered.

All the judges concurring,

Judgment reversed, and new trial ordered.

BAKER v. HIGGINS.

On a written contract to "deliver 25,000 pale brick for \$3 per M, and 50,000 hard brick at \$4 per M, cash," the delivery, or readiness and offer to deliver the entire quantity, is a condition precedent to payment.

Parol evidence is inadmissible to show that the parties intended that payment should be made for each parcel of the brick, as they should be delivered.

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APPEAL from the Supreme Court. Action to recover for brick sold and delivered. The trial was before a referee, who received parol evidence of a contract for the sale of the brick. It subsequently appearing that the contract was put in writing, the defendant moved that the parol evidence of its tenor should be stricken out. To the referee's refusal to strike out the evidence, and to his refusal to nonsuit the plaintiff, the defendant took exceptions. The referee, in his finding of facts, found, in accordance with the parol evidence, that the defendant agreed to pay for the brick as fast as delivered. Judgment for the plaintiff, upon his report, having been affirmed at general term, in the third district, the defendant appealed to this court.

Roswell A. Parmenter, for the appellant.

John B. Bronk, for the respondent.

WELLES, J. On the trial before the referee, the plaintiff gave evidence tending to show that, by the contract between him and the defendant for the sale and delivery of the brick in question by the former to the latter, the brick was to be paid for as they were delivered. It also appeared, on the part of the plaintiff, that, at the close of the conversation between the parties by which the contract was negotiated, the plaintiff wrote something on a piece of paper and handed it to the defendant, upon which the parties separated. None of the plaintiff's witnesses were able to state what the writing contained. The defendant produced and identified the paper, which turned out to be as follows: "I will deliver John Higgins 25,000 pale brick, on the dock at East Troy, for \$3 per M, and 50,000 hard brick, at the same place, at \$4 per M, cash. E. W. Baker, Coxsackie." This, I think, was a valid agreement, and must be deemed and taken as the agreement then made between the parties in relation to the brick, and under which a part was afterwards delivered.

Not long after this agreement, the plaintiff delivered to the defendant, at Troy, under the written contract, a cargo of brick,

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consisting of 10,500 hard and 10,500 pale bricks, and demanded payment for that quantity, which the defendant refused until the whole was delivered. This, I think, he had a right to do. The contract was entire, to deliver 75,000 bricks; and the plaintiff was not entitled to pay for any part until the whole was delivered, or until he was ready and offered to deliver the balance, which the plaintiff has not done. The action was brought for the contract price of the 21,000 bricks delivered; and the referee found, contrary to the legal import of the written agreement, that the brick was payable on delivery, ~~as~~ the same should be delivered. For this error the judgment should be reversed, and a new trial directed in the court below, with costs to abide the event.

SELDEN, CLERKE, and WRIGHT, Js., dissented; all the other judges concurring,

Judgment reversed, and new trial ordered.

GARDNER v. CLARK.

Matter in abatement, *e. g.*, the pendency of a former suit for the same cause of action, is properly joined in the same answer with a defence in bar.

Sweet v. Tuttle (4 Kern., 465), in this respect reaffirmed.

Where the case goes to the jury upon both defences, it is the duty of the judge to require a separate verdict upon them.

Whether the pendency of an action by the original owner of a claim is pleadable in abatement to the prosecution of a suit for the same cause of action by an assignee thereof subsequent to the commencement of the first action, *Query*, per SELDEN, J.

That the defendant was arrested upon a *capias*, at the suit of the assignor, is not a good plea of a former action pending for the same cause; and it not appearing that a declaration was filed or served, the pleading is not helped by the averment that the *capias* was for the same identical cause of action.

A party under contract to deliver articles by the wagon-load, and entitled to pay for each wagon-load as delivered, does not waive that right, but may treat the contract as broken by a single failure to make payment

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upon tender of delivery, although he has repeatedly delivered loads without payment, and has given the other party no notice of his intention to insist upon immediate payment thereafter.

APPEAL from the Supreme Court. Action by the assignee of one Adison Gardner for damages from the non-performance of a contract to sell and deliver a thousand bushels of barley, at forty-four cents per bushel. The barley was to be delivered at the storehouse of one Dunham, who was Gardner's agent for the purpose of receiving and paying for the same, and was to be paid for as fast as it should be delivered.

The defendant's answer set up, among other things, the delivery of a portion of the barley, and that the defendant had always been willing and ready to deliver the residue, according to the terms of the contract; but that Gardner was not ready or willing to receive or pay for the same, according to the terms of the contract. The evidence upon this point, and the decisions of the judge at circuit founded thereon, are sufficiently stated in the following opinion.

For a further answer, the defendant averred that, in November, 1847, Adison Gardner, then being the sole person in interest in the contract and damages which are the subject of this suit, commenced an action in the Supreme Court against the defendant by writ of *capias ad respondendum*, commanding the sheriff to have the body of the defendant before, &c., at, &c., to answer, &c., in a plea therein mentioned; that the defendant was taken and held to answer; "and that, by said writ and taking of the said Perkins Clark as aforesaid, a former suit and action at law was commenced by the said Adison against the said defendant for and upon the same identical cause of action in this present action mentioned, and that the said former action is pending and not discontinued." Upon the trial the defendant offered proof in respect to such former action, making his offer in the same terms precisely as those of the answer. The judge, upon the objection of the plaintiff, rejected the evidence, holding that such former action was no defence, and that the defendant, having interposed a defence on the merits, waived his defence of the former action pending, and could not prove

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his offer. The defendant took an exception. The charge and exceptions thereto are sufficiently stated in the following opinion. The jury found a verdict for the plaintiff, and the judgment entered thereon having been affirmed at general term in the fifth district, the defendant appealed to this court.

Francis Kernan, for the appellant.

Samuel Beardsley, for the respondent.

SELDEN, J. It is quite certain that the judge at the circuit erred in supposing that, by including a defence upon the merits in the same answer with the defence of a former suit pending for the same cause of action, the defendant had waived the latter defence. A doubt at one time existed, whether the Code had abrogated the rule of the common law which required matters in abatement to be first pleaded and disposed of before pleading in bar to the action; and there were, in the Supreme Court, conflicting decisions upon the subject. The question, however, came before this court in the case of *Sweet v. Tuttle* (4 Kern., 465), where it was held that the Code provided for but a single answer, in which the defendant is required to include every defence upon which he relies to defeat the action. This decision must be considered as settling the question. The only serious inconvenience suggested as likely to result from this construction of the Code is, that when an answer embraces both a defence in abatement and in bar, if the jury find a general verdict, it will be impossible to determine whether the judgment rendered upon the verdict should operate as a bar to another suit for the same cause of action or not. It would, however, be the duty of the judge at the circuit, in such a case, to distinguish between the several defences in submitting the cause to the jury, and require them to find separately upon them. In that way, it is probable that the confusion which might otherwise result may, in most cases, be avoided. At all events, the Code admits, I think, of no other construction.

The judge, therefore, was not justified in rejecting the evidence offered at the trial to show the pendency of a former suit

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for the same cause of action, upon the ground that this branch of the defence had been waived by including in the answer a defence upon the merits. If, however, for any other reason, the evidence was inadmissible, its exclusion should be sustained. The judge gave another reason for rejecting it, viz. that "such former action pending was no defence to this action."

It is argued, in support of this ground for excluding the evidence, that, although the pendency of the suit commenced by Adison Gardner would have been a good answer to another suit brought by him while he continued to own the demand, it is, nevertheless, no answer to a suit brought in the name of the assignee after the assignment to her. This would, I think, be a question of some difficulty, if it were really presented. But, in the view I take of the case, it does not become necessary to pass upon it.

The extent of the allegation in the answer on the subject of a prior suit is, that a *capias ad respondendum* was issued "in a plea therein mentioned," and that the defendant was arrested upon the writ and held to answer "in a plea as aforesaid," and that by this writ and taking a former suit at law was commenced for "the same identical cause of action," &c.

Now, it is clear that these allegations do not make out the pendency of such a suit as would be any defence to this action, were it brought in the name of Adison Gardner himself. Under our former system of practice, the cause of action could not be determined from the *capias ad respondendum* alone. Even if the *capias* contained what was called an *ex etiam* clause, that is, a clause stating in general terms the nature and form of the action intended, still the only consequence of declaring in any other form, and for any other cause of action, was, that the plaintiff thereby waived all right to bail in the action, if bail would otherwise have been required. But the allegation here is, simply, that the defendant was held to answer in a plea mentioned in the writ. For aught that appears, the *capias* issued was the ordinary writ requiring the defendant to answer in a plea of trespass only; in which case, the plaintiff

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was at entire liberty to declare in such form and for such cause of action as he might see fit. Until a declaration was filed or served, therefore, it was impossible, in a suit commenced by *capias*, to ascertain what the real cause of action would ultimately be. The allegation that the suit was for "the same identical cause of action," is not supported by the facts upon which it is predicated, and adds nothing whatever to the force of the previous averments. The answer in question, therefore, so far as it sets up the pendency of a former action by the same cause, is palpably defective, and, if demurred to, must have been held entirely insufficient to abate the suit.

The offer made at the trial was simply to prove the facts stated in the answer. The defendant, in making the offer, quoted the language of the answer, as embracing the precise facts which he intended to prove. The inference plainly is, that this was all the evidence which he was prepared to give on the subject; and as these facts, if proved, would obviously have fallen quite short of making out any legal defence, the judge was right in rejecting the evidence as wholly immaterial.

An exception was taken to that part of the charge to the jury, in which the latter was told that, assuming that the defendant was entitled to demand payment for each load of barley upon its delivery, yet if he delivered several loads without requiring payment, "it was, in law, a waiver of the condition of the payment for each load as delivered, and credit was thereby given to Gardner for the barley so delivered." This portion of the charge is somewhat equivocal, and its accuracy depends upon the interpretation which is given to it. If it meant that the defendant could no longer insist upon the condition in respect to the barley which had been delivered, it is simply a self-evident proposition. If, on the other hand, it means that, by delivering several loads without insisting upon payment, the defendant had waived the condition as to the barley still to be delivered, so that upon the delivery of a subsequent load he could no longer insist upon payment for such load, it was, I think, clearly erroneous. I am inclined,

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however, to think that neither of these is the true interpretation; but that what the judge intended to say, and what the jury must have understood him to say, was, that the defendant could not insist upon payment for the barley which had been delivered, as a condition precedent to the delivery of the residue. If this is the true meaning of the language used in this portion of the charge, it was, in my judgment, obviously right.

But the judge carried his views as to the effect of the defendant's act in waiving the condition as to several of the loads to still greater and, as I think, erroneous lengths, in the subsequent parts of his charge. He was requested by the counsel to charge, that, "although the defendant had not required payment for each load so delivered, so far as the same had been delivered, yet the defendant had a right at any time, upon being ready to deliver a load and offering so to do, to demand payment for such load, and that, upon non-compliance by the plaintiff, the contract was broken on his part." This request was refused by the judge, and the ground of this refusal is shown by his proceeding to charge that, "if the said defendant intended to require payment for each load as delivered, for the barley thereafter to be delivered, and thus change the practice which he had begun with, he should have given Gardner *reasonable notice* that he intended to make such change, and should make demand of payment in such manner that it could have reasonably been complied with on the part of Gardner."

It is impossible, I think, to sustain the position here taken by the judge. Upon what principle the omission by the defendant to insist upon his right to payment as to some of the loads of barley delivered can operate as a waiver of his right as to the residue, I am unable to perceive. There would, perhaps, be a legal difficulty in the way of its having this effect, even if so intended. A waiver, like a gift, can only operate *in presenti*. When intended to operate *in futuro*, it is at most only an agreement to waive, which, it would seem, must, like all other agreements, have a consideration. But, conceding that the defendant might, without any consideration, have

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bound himself, by agreeing in advance to waive his right to require payment for any portion of the barley when it should be delivered: how can the mere waiver of such right, as to one or more loads, amount to such an agreement? It could, at most, only afford some slight evidence that the defendant did not intend to insist upon payment in hand for the subsequent loads; but would this unexpressed intention, even if entertained, be obligatory upon him? I think not. The contract bound Gardner to have the money ready, at all times, at 'the place of delivery, to pay for each load as it should arrive; and although he might have some reason to suppose, from the delivery of several loads without requiring payment, that the defendant did not intend to insist upon payment in hand for the subsequent loads, yet this mere supposition could not release him from the positive obligation of his contract.

But it was said upon the argument, that there was no evidence in the case to which the charge which the judge was requested to make could properly apply; and, hence, the judge was justified in his refusal, even if the principle embodied in the request is regarded as correct. It is true that a judge is not bound to charge upon a mere abstract proposition, not necessarily involved in the case. If, therefore, there was no evidence tending to show that Gardner had ever neglected or refused to pay for a load of barley which the defendant had actually offered and was then ready to deliver, the judge would have been under no obligation to instruct the jury as requested by the defendant's counsel. But such evidence is, I think, clearly to be found in the testimony of the defendant. He says: "I went with one load, and stopped and went to Dunham's, and asked for my pay of Dunham; Dunham said he had nothing to pay with, and I *then went* and sold the barley to Mr. Crouse." If this means that, when he called upon Mr. Dunham at this time, he had a load of barley there, which he was ready to deliver upon receiving payment for that load, and that all that he asked for was payment for the load he then had, it makes out the case contemplated in the request of the defendant's counsel. Whether this is the meaning of this

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portion of the testimony, was clearly a question for the jury. My conclusion, therefore, is, that the judge erred in refusing to charge as requested, and that for this error the judgment should be reversed, and there should be a new trial with costs to abide the event.

COMSTOCK, Ch. J., DAVIES, CLERKE, WRIGHT and WELLES, Js., concurred; DENIO and BACON, Js., took no part in the case.

Judgment reversed, and new trial ordered.

ROBINSON, Receiver, &c., v. THE BANK OF ATTICA.

Associations organized under the general banking law are within the provisions (1 R. S., 603, § 4) prohibiting any incorporated company from making any transfer or assignment in contemplation of insolvency.

They are not excluded by the exception (1 R. S., 605, § 11), because, though moneyed corporations, they are, by the construction of the act authorizing their creation, not subject to the "regulations to prevent the insolvency of moneyed corporations," otherwise than as some of those regulations are expressly adopted and applied.

The payment of a debt to a *bona fide* creditor is prohibited by the statute, equally with a general transfer of property or an assignment in trust for creditors.

A transfer is in contemplation of insolvency, as well where the insolvency actually exists as where it is anticipated.

A *dictum* to the contrary, in *Haxtum v. Bishop* (3 Wend., 17), disapproved.

APPEAL from the Superior Court of the city of Buffalo. Action by the receiver of the Hollister Bank of Buffalo, an insolvent corporation, organized under the general banking law, to recover the value of certain promissory notes transferred to the defendant by the Hollister Bank. On the trial before the court, without jury, these facts were found: On the 28th of August, 1857, the Hollister Bank procured two drafts to be drawn upon it, payable September 3, 1857, and September 5, 1857, and, after certifying the drafts to be good, procured,

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through the agency of the accommodation drawer, a loan of \$5,000, upon the security of such drafts, from the defendant, which was also a banking association, organized under the general banking law, and doing business in the city of Buffalo. The defendant had no knowledge that the loan was procured for the benefit of the Hollister Bank. On Saturday, the 29th day of August, 1857, the Hollister Bank was insolvent, and did not resume business after that day. On Sunday morning, the Hollister Bank delivered to the drawer of the drafts before mentioned six promissory notes, which had been discounted by it, and none of which had arrived at maturity, and also \$40.53 in cash, making, in the aggregate, the value of \$5,000—the drawer undertaking therewith to retire the checks upon which he had procured the loan from the Bank of Attica. On Monday morning he took the money and notes to the Bank of Attica, which, after holding them for the purpose of examination, on the next morning, September 1, 1857, accepted the notes and money, and surrendered the checks to the drawer, by whom they were canceled. The Bank of Attica, when it took the notes and money, had notice, sufficient to put it upon inquiry, that they belonged to the Hollister Bank. It also had notice, on the 31st day of August, 1857, that the Hollister Bank was insolvent, and would not resume business. Proceedings were instituted on the 1st September, 1857, for the appointment of a receiver, &c., and on the next day an injunction was issued, restraining the Hollister Bank from transacting any further business, &c. The plaintiff had judgment, which having been reversed, on appeal, at general term, the plaintiff appealed to this court.

John L. Talcott, for the appellant.

John Ganson, for the respondent.

WELLES, J. The Revised Statutes provide that it shall not be lawful for any incorporated company to make any transfer or assignment, in contemplation of the insolvency of such

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company, to any person or persons whatever; and declare that every such transfer and assignment shall be utterly void. (1 R. S., 608, § 4.) This section belongs to title 4 of chapter 18 of part first, and in terms embraces the present case. The notes and money mentioned in the finding of facts by the court below, amounting to \$5,000.01, were transferred by the Hollister Bank to the Bank of Attica, the defendant, in anticipation of the insolvency of the former, and by the statute referred to the transfer was utterly void, provided the Hollister Bank was an incorporated company and subject to the section and title of the Revised Statutes referred to.

The 11th section of the same title is as follows: "The provisions of this title shall not apply to any incorporated library or religious society; nor to any moneyed corporation which shall have been or shall be created, or whose charter shall be renewed or extended after the 1st day of January, 1828, and which shall be subject to the provisions of the 2d title of this chapter." The Hollister Bank was an association for banking purposes, formed under the act of 1838, entitled, "an act to authorize the business of banking."

Although the question, whether the legislature which enacted the last mentioned statute intended to invest the banking associations to be formed under it with the attributes and qualities of corporations, has been gravely doubted by able jurists, that question should now be considered at rest in consequence of the repeated decisions of the courts holding that they are corporations. (*The People v. Supervisors of Niagara county*, 4 Hill, 20; *Willoughby v. Comstock*, 3 Id., 339; *The People, ex rel. The Bank of Watertown, v. Assessors of Watertown*, 1 Id., 616; *Leavitt v. Blatchford*, 5 Barb. S. C. R., 9, and cases there cited; *S. C. on appeal*, 17 N. Y. R., 521; *Gillet, receiver, &c., v. Moody*, 8 Comst., 479; *Cuyler v. Sanford*, 8 Barb. S. C. R., 225.) After such a long course of adjudication on the subject, it would not be profitable to examine the question upon the act of 1838 as an original one. The 4th section of title 4, above referred to, uses the expression "incorporated company." If the associations formed under the general banking law are

corporations, no argument is necessary to prove that they are incorporated companies.

It only remains to consider whether the 4th section, before mentioned, applies to these banking associations. That depends upon whether they are moneyed corporations, subject to the 2d title of the chapter referred to. If they are, then the said 4th section does not apply to them. The language of the 11th section implies that there was, or might be, a class of moneyed corporations which would not be subject to the said 2d title. That such associations are moneyed corporations does not, therefore, prove that they are subject to the provisions of the 2d title. That they are moneyed corporations, is as well settled as that they are corporations at all. Indeed, if they are corporations, there can be no escape from the conclusion that they are moneyed corporations. Then, are they subject to the provisions of the 2d title? This question has been so distinctly answered in the negative by several recent decisions of this court, that I am relieved from any examination or discussion of it. (*Curtis v. Leavitt*, 15 N. Y., 9; *Leavitt v. Blatchford*, 17 *Id.*, 521; *International Bank v. Bradley*, 19 *Id.*, 245.) In the case cited from 17 New York, it is held that associations under the act to authorize the business of banking are not subject to the "regulations to prevent the insolvency of moneyed corporations," &c. (2 R. S., 588), except so far as they have been incorporated into the general banking law of 1838, or expressly applied by subsequent statutes. Judge HARRIS, who delivered the prevailing opinion of the court, reviews the cases in which the question had been considered and passed upon, and concludes his remarks on the subject as follows: "Upon the whole, I am satisfied that the legislature of 1838 intended to introduce a new and independent system of banking, and establish, for the government of institutions organized under such new system, new and independent regulations, and to leave all previous statutes relating to moneyed corporations to be applied to chartered banks then in existence." In the previous case of *Curtis v. Leavitt* (15 N. Y., 9), Judge COMSTOCK discusses the question with great ability and clear

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ness, and shows that the provisions of the 2d title of the Revised Statutes, above referred to, and which is entitled, "Regulations to prevent the insolvency of moneyed corporations, and to secure the rights of their creditors and stockholders," do not apply to associations organized under the general banking law. And in the case of *The International Bank v. Bradley* (*supra*), the same doctrine was distinctly recognized and acted upon. The three cases last mentioned clearly overrule all that had been held or asserted to the contrary in previous cases.

The 4th section of title 4 of chapter 18 of the first part of the Revised Statutes embraces, in terms, all incorporated companies; but the 11th section of the same title excludes from its operation incorporated libraries, religious corporations, and such moneyed corporations as are subject to the 2d title of the same chapter, leaving all other corporations under its operation. The Hollister Bank, therefore, being an incorporated company, and not subject to the provisions of the 2d title of the chapter referred to, and the transfer of the notes and money in question being in contemplation of insolvency, it follows that the transfer was void.

The finding of facts by the court before which the cause was tried, as contained in the Case, does not state that the transfer was made in contemplation of insolvency; but the facts distinctly found and stated in the finding are sufficient to require of the court to adjudge, as matter of law, that the transfer was in contemplation of insolvency.

It is contended by the counsel for the defendant that the 4th section of title 2 does not apply to the present case: 1st. Because the clause of that section relied upon by the plaintiff is applicable only to a general assignment, and not to the payment of any creditor; 2d. Because associations formed under the general banking law are not subject to any provisions of the statutes applicable to corporations created by special charters; and, lastly, that the Hollister Bank, having paid the two acceptances in question to the defendant (who was the *bona fide* holder of them for value), before the appointment of the receiver, the

payment (the transfer in question) was valid, and should be permitted to stand.

In regard to the first of these reasons, it is sufficient to say, that the statute referred to forbids any transfer or assignment in contemplation of insolvency. The case is within the letter of the statute, and most clearly within its spirit and policy.

In this connection, the case of *Haxtun & Brace v. Bishop* (3 Wend., 13), is referred to by the defendant's counsel. In that case, the assignment in question was general of all the effects of the Greene County Bank in trust for the benefit of the creditors of the bank without preference. The court held the assignment valid, although that was unnecessary to produce the result which was arrived at by the court. I confess my inability to perceive how the case can be regarded an authority for the defendant in this particular connection. It is true, Judge SAVAGE, who delivered the opinion of the court, makes some remarks, which, perhaps, bear on the question, whether the transfer in this case was in contemplation of insolvency. But, upon that question, there seems to have been no point made between these parties. The remarks of Judge SAVAGE are to the effect that an act, to be in contemplation of insolvency, must be done in anticipation of insolvency, that is, in view of a future state of things expected or contemplated to take place after the act is done.

To exclude from the operation of the 4th section of the 4th title; under consideration, transfers and assignments made in view or contemplation of present existing insolvency of the corporation, would be to deprive it of its most efficacious, practical and useful quality and character. Such, I am persuaded, is not the true construction of the section.

The second reason assigned by the counsel, why the 4th section does not apply to this case, has already been considered, and shown not to be available.

In respect to the remaining reason in support of the proposition, I can only say that its force is not perceived. The spirit of the 4th section forbids any parting with its effects by a corporation not excepted from the operation of the 4th title

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by the 11th section of the same title, in contemplation of insolvency, whether existing or anticipated. This case, I think, was within the letter as well as the policy and purview of the statute. The notes and money were transferred by the Hollister Bank, none the less because they were received by the defendant in payment of the acceptances.

For the foregoing reasons, we are of the opinion that the order of the general term of the Superior Court, granting a new trial, should be reversed, and that the judgment of the special term of the same court should be affirmed.

DAVIES, J., delivered an opinion substantially to the same effect as the preceeding; all the other judges concurring,

Judgment affirmed.

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The plaintiff, having in his possession a canal boat belonging to A, and having a lien upon it for repairs made by him, delivered the boat to A, at the defendant's request, and upon his verbal promise to pay the amount due for such repairs: there being no new consideration moving to the defendant, his promise is void under the statute of frauds.

The cases not within the statute, though the promise relates to an existing debt of a third party, thus classified: *Per Comstock, Ch. J.*

1. Where there is no original debt to which the promise is collateral, *e. g.*, where the promisee is a mere guarantor to another for a third person, and the promisor agrees to indemnify him; or where his demand was founded upon tort.
2. Where the original debt is extinguished, and the creditor has no remedy but on the new promise, *e. g.*, where the new undertaking is accepted as a substitute for the original demand; or where the demand being deemed satisfied by the arrest of the debtor's person or a levy upon his goods, the arrest or levy is discharged by the creditor's consent.
3. Where, although the original debt remains, the new promise is founded upon a consideration which moves to the promisor, *e. g.*, when it comes from the debtor, where he puts a fund into the hands of the promisor by absolute transfer or upon trust to pay the debt, or it came to the promi-

21	413
108	226
21	413
115	641
21	413
116	309
116	270
116	271
21	413
124	547
21	413
132	309
21	412
145	449
21	412
150	239

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or's hands charged with the debt as a prior lien ; or where the consideration originates in an independent dealing between the creditor and the promisor, as where the latter, for a stipulated compensation, guarantees the payment to him of a sum due by a third person ; or where the creditor transfers the debt of A to B, and, upon sufficient consideration, guarantees it by parol.

Numerous cases reviewed and explained, and *Fay v. Bell* (Lalor's Supp. to Hill and Denio, 251), overruled.

APPEAL from the Supreme Court. The complaint was, that the plaintiff, at the request of one Haines, had taken upon his dry-dock the canal boat Metropolis, and put upon it repairs to the value of \$125. The boat being in the plaintiff's possession under a lien for the repairs, he refused to deliver it to Haines or to any other person until the amount should be paid ; whereupon the defendant, in consideration of the premises and that the plaintiff would deliver the boat to Haines, promised the plaintiff to pay the amount due for such repairs. The plaintiff thereupon delivered the boat to Haines: the defendant paid him \$50, but subsequently refused to pay the residue. The defence was, that the defendant's promise was not, nor was any note or memorandum thereof, in writing.

Upon the trial before a referee, the facts were admitted to be as stated in the complaint and answer. The referee ordered judgment for the defendant, which having been affirmed at general term in the seventh district, the plaintiff appealed to this court.

George T. Spencer, for the appellant.

Henry M. Hyde, for the respondent.

COMSTOCK, Ch. J. This case ought to be one of first impression. By the statute of frauds, all promises to answer for the debt of a third person are void unless reduced to writing. One Haines owed the plaintiff a debt for repairs on a boat, for which the latter had a lien on the chattel. In consideration of the relinquishment of that lien, and of forbearance to sue the origi-

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nal debtor, the defendant promised the plaintiff, without writing, to pay the debt at a certain future time. There is no pretence that the defendant's promise was given or accepted as a substitute for the original demand, or that such demand was in any manner extinguished. The promise was, therefore, to answer for the existing and continuing debt of another, or, in the language of the books, it was a collateral promise. The consideration was perfect, but as there was no writing, the case seems to fall within the very terms of the statute. Authorities need not be cited to prove that the sufficiency of the consideration never takes a case out of the statute. Indeed, there can be no question under the statute of frauds in any case, until it is ascertained that there is a consideration to sustain the promise. Without that element, the agreement is void before we come to the statute. A naked promise is void on general principles of law, although it be in writing. The mere existence of a past debt of a third person will not sustain an agreement to pay it, unless there be forbearance to sue, or some other new consideration. In such a case, when we find there is a new consideration, we then, and not till then, reach the inquiry whether the agreement must be in writing. Such is this case. It is nothing to say that here was a new consideration. If such were not the fact, there would be no question in the case.

There is sometimes danger of error creeping into the law through a mere misunderstanding or misuse of terms. The words "original" and "collateral" are not in the statute of frauds, but they were used at an early day—the one to mark the obligation of a principal debtor, the other that of the person who undertook to answer for such debt. This was, no doubt, an accurate use of language; but it has sometimes happened that, by losing sight of the exact ideas represented in these terms, the word "original" has been used to characterize any new promise to pay an antecedent debt of another person. Such promises have been called original, because they are new; and then as original undertakings are agreed not to be within the statute of frauds, so these new promises, it is often argued, are not within it. If the terms of the statute were adhered to,

or a more discriminating use were made of words not contained in it, there would be no danger of falling into errors of this description.

What is a promise to answer for the "debt or default" of another person? Under this language, perplexing questions may arise, and many have arisen, in the courts. But some propositions are extremely plain; and one of them is, that the statute points to no distinction between a debt created at the time when the collateral engagement is made, and one having a previous existence. The requirement is, that promises to answer for the debt, &c., of a third person, be in writing. The original and collateral obligations may come into existence at the same time, and both be the foundation of the credit, or the one may exist and the other be created afterwards. In either case, and equally in both, the inquiry under that statute is, whether there be a debtor and a surety, and not when the relation was created. The language of the enactment is so plain that there is no room for interpretation; and its policy is equally clear. If A say to B, "If you will suffer C to incur a debt for goods which you will now or hereafter sell and deliver to him, I will see you paid," the promise is within the statute. This no one ever doubted. But if A say to B, "If you will forbear to sue C for six months on a debt heretofore incurred by him for goods sold and delivered to him, I will see you paid"—is not the case equally plain? So if, in such a case, instead of forbearance, there is some other sufficient consideration, for example forgiving a part of the debt or relinquishing some security for it, the difference is still one of circumstance, but not of principle. In the case first put, the consideration of the guaranty is the original sale of the goods on the faith of it: in the other, it may be forbearance or the relinquishment of some advantage, the original debt still remaining. Looking at the comparative merit of these considerations, it would seem to be the highest in the first case, for the whole debt owes its origin to the collateral promise, while in the other the debt remains as before, and only some collateral advantage is lost. But the application of the statute depends on no such test. These

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considerations are, all of them, sufficient, and simply sufficient, to sustain the auxiliary undertaking. But if they also dispense with a writing, then, so far as I can see, there are no cases to which this branch of the statute of frauds can be applied.

Such an extreme position has not been taken; but it is said that the promise now in question need not be in writing, because it was new and original, and was founded on the relinquishment to the debtor of a security which the creditor held. To say that it was new and original, expresses no idea of any importance. Every promise is new and original that was never made before. An undertaking to answer for an old debt of a third person certainly has no more of originality than one to answer for a debt now contracted. As to the relinquishment of the lien or security, this, although a meritorious consideration, is, in judgment of law, no more so than any other which is sufficient to sustain a contract. Forbearance to sue has the same legal merit, and so has the release of a part of the debt.

There is nothing so remarkable or peculiar about this case that it may not be included in some general proposition which involves a principle of law. Now, one of these two propositions must, I think, be true: 1. The statute of frauds never applies to a promise, the subject of which is an antecedent debt of a third person to which it is collateral; or, 2. It applies to all such promises where the consideration moves solely between the creditor and original debtor and the debt still remains. If the first is true, then the promise in question is valid without a writing, and so would any such promise be, without regard to the particular nature of the consideration; it being necessary, of course, that there should be some sufficient consideration. If the first be not true, and the second is, then the promise in this case is void, because it falls directly within it. The first proposition cannot be true, upon the plain terms and evident policy of the statute; and no such doctrine was ever asserted. The universal truth of the second one necessarily follows, unless the law will discriminate between different promises according as the consideration

may differ in the particular nature or kind. But is such a discrimination possible, so long as, in any given case, the consideration is sufficient in the eye of the law, and moves solely between the original parties? No one, it seems to me, can hesitate to answer such a question in the negative. Yet we are told, without reason or principle, that when a creditor releases a security to the debtor, although without releasing the debt, a promise of another person, founded on that peculiar consideration, is not within the statute. The inevitable logic of such a proposition will include a like promise founded on any other consideration equally sufficient to sustain a contract; and, therefore, we are carried back to the first general proposition above stated, which is admitted to be false. It has already been observed, that, without a consideration, no question on the statute of frauds can arise.

In this elementary view of the question, I do not understand that much difference of opinion exists. It is claimed, however, that the course of adjudication has been such, that we cannot determine the case before us according to a consistent rule of law. This argument is founded in a misapprehension of the authorities, some reference to which will be necessary.

In this State, an early case, and one of very high authority, is that of *Leonard v. Vredenburg* (8 Johns., 29), in which Chief Justice KENT divided the cases on this branch of the statute of frauds into three classes, as follows: 1. Where the promise is collateral to the principal contract, but is made at the same time, and becomes an essential ground of the original credit. 2. "Cases in which the collateral undertaking is subsequent to the creation of the debt, and was not the inducement to it, though the subsisting liability is the ground of the promise." "Here," the Chief Justice observed, "there must be some further [or new] consideration shown, having an immediate respect to such liability; for the consideration of the original debt will not attach to this subsequent promise. 3. Cases where the promise to pay the debt of another arises out of some new and original consideration of benefit or harm moving between the newly contracting parties." "The two first classes," he further

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observed, "are within the statute of frauds, but the last is not," I suppose, in the light of later decisions, that the opinion of that great jurist, delivered in the case cited, may contain some inaccurate remarks respecting the right to prove a consideration for a collateral agreement where none appeared in the writing. It would be so considered, especially since the change we have made in the language of the statute of frauds, requiring the consideration to be expressed in the collateral instrument. But the above classification of the cases, and the connected remarks respecting each class, are strictly correct, and they have been a landmark of the law for forty years. Does the present case belong to the second class, which is within the statute, or to the third, which is not? Manifestly it belongs to the second, because that is a class where the undertaking is subsequent to the creation of the debt. It does not fall without that class in consequence of the newness of the consideration, because, the learned Chief Justice said, "here must be some further [new] consideration having an immediate respect to such liability." It cannot fall within the third class, because, if we arrange it there, we necessarily compress the two classes into one, or, more properly speaking, we merge the second wholly into the third. In such a disposition of the present question, no second class is left of collateral undertakings subsequent to the creation of the original debt, founded, as they must be, on some new or "further consideration."

The classification referred to, on a casual reading, is perhaps open to some misapprehension, and I think it has been occasionally misapprehended. What, then, is the true distinction between the second and third classes? They are both of them promises, in form at least, to pay the antecedent debt of a third person, and in that respect they are alike. The distinction, therefore, is in the *consideration* of the promises which belong to the two classes; not in respect to its particular nature or kind, but in respect to the parties between whom it moves. In the one class, the consideration is characterized as a "further one, having immediate respect to the [original] liability" of the debtor; in the other, as "new and original moving between

the newly contracting parties." In the second class, the new or "further" consideration moves to the primary debtor. It may consist of forbearance to sue him, of a release to him of some security, or of any sufficient benefit to him or harm to the creditor, but in which the collateral promisor has no interest or concern. In the third class, the consideration, whatever its nature, moves to the person making the promise, and that also, as in all other cases of contract, may consist of benefit to him or harm to the party with whom he is dealing. This distinction is also extremely well expressed by Chief Justice SHAW, of the Supreme Court of Massachusetts. One class of cases (within the statute), he says, is "where the direct and leading object of the promise is to become the surety or guarantor of another's debt;" the other class (not within the statute) is "where, although the effect of the promise is to pay the debt of another, yet the leading object of the undertaker is to subserve or promote some interest or purpose of his own." (*Nelson v. Boynton*, 3 Metc., 396-400.) Chief Justice SAVAGE, in this State (*Farley v. Cleveland*, 4 Cow., 432, 439), made the same classification. "In all these cases," he observed, referring to those which fall within the third class, "founded on a new and original consideration of benefit to the defendant or harm to the plaintiff, *moving to the party making the promise*, either from the plaintiff or original debtor, the subsisting liability of the original debtor is no objection to a recovery." In one respect, this language of Chief Justice SAVAGE has greater precision than that of Chief Justice KENT. The latter speaks of the consideration as "moving between the newly contracting parties." The former characterizes it as moving to the party making the promise. This description is more exact, as well as more comprehensive, because it includes a variety of cases found in the books, where the new consideration springs from the original debtor and not the creditor, as, for example, where the debtor, by conveyance of property or otherwise, places a fund in the hands of a third person, the latter promising, in consideration thereof, to pay the debt. But the difference is not one of principle, because there is a sense in which,

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even in such cases, the new consideration moves from the creditor through the debtor to the person making the promise, and on that ground many cases hold that the creditor may himself sue on the promise, although it was made to the debtor. (*Lawrence v. Fox*, 20 N. Y., 268, and the cases cited.) Where the promise in this particular description of cases has been made directly to the creditor, the only question has been on the statute of frauds; and the rule is very properly settled that they are not within the statute. The cases of *Farley v. Cleveland* (*supra*), *Gold v. Phillips* (10 John., 412), and *Olmstead v. Greenley* (18 *Id.*, 12), belong to this class.

Omitting, then, the first class of collateral undertakings—I mean those made at the same time with the creation of the debt—as having nothing to do with the present question, there are two kinds of promises of extensive use in the dealings of community, which, in form and effect, very much resemble each other; each being to answer for or pay a debt already due or owing from a third person, yet wholly different in respect to the motive and consideration. In the one class the promisor has no personal interest or concern, and his undertaking is made solely upon some fresh consideration passing between the creditor and his debtor. This class is within the statute. In the other, the promise may be in the same form, and, when performed, may have the same effect, but it is made as the incident of some new dealing in which the promisor is himself concerned, and upon a consideration passing between the creditor or the debtor and himself. This class, which may include a great variety of particular examples, is not within the statute. The distinction is broad and intelligible, although the formal resemblance in such transactions may have occasionally led to inaccuracy of expression or decision. The great body of the cases, however, will be found to illustrate this distinction, and to establish it firmly as a guide in this branch of the law. If such a distinction were a questionable one, the tendency of the doubt would necessarily be in the direction of holding both classes of cases to be within the statute, but

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never in the direction of placing without the statute any one of the cases belonging to the first of these classes.

With this classification before us, it will be proper to notice more in detail the cases cited on the argument, and others not cited. In *Shelton v. Brewster* (8 Johns., 376), the promise was held not within the statute, because the debtor had delivered goods to the defendant as the consideration of the undertaking, and the plaintiff, the creditor, had discharged the debt. For two reasons, therefore, the promise by parol was good: first, it was founded on a new consideration received by the promisor, and, second, it was accepted as a substitute for the original debt, it could not be collateral.

In *Gold v. Phillips* (10 Johns., 412), one Wood owed the plaintiffs. He conveyed land to the defendants, who, upon that consideration, bound themselves to him to pay that and other debts. Being thus bound, they so informed the plaintiffs, and agreed to pay them. The case, therefore, very distinctly falls within the third class, according to the distinctions above set forth. *Bailey v. Freeman* (11 Johns., 221) was on a written guaranty made at the same time with the principal contract, and it has nothing to do with the present question. *Nelson v. Dubois* (18 Johns., 175) is equally foreign to the inquiry. The plaintiff sold a horse to one Brundige, taking therefor the note of Brundige, payable to himself or bearer, and indorsed by the defendant. The legal proposition in the case was, that a guaranty might be written over the defendant's name, it being a condition of the sale that he should become security for the price. In *Myers v. Morse* (15 Johns., 425), the plaintiffs were liable as indorsers of a note of one H. Morse, and they held a note of the same person indorsed by the defendant. The declaration set forth that the plaintiffs had agreed not to hold the defendant liable on his indorsement, in consideration of which, the defendant agreed to indemnify them against one-third of any loss they might sustain on their own indorsement of the same person's note. A plea of the statute of frauds was held bad. This was plainly a case where the consideration moved to the defendant himself, and, therefore, it was held to

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fall within the third class of cases, according to the distinction which has been explained. The definition of Chief Justice KENT, in *Leonard v. Vredenburg*, was expressly adopted and applied to the facts. In *Olmstead v. Greenly* (18 Johns., 12), the plaintiff was an accommodation indorser on the note of B, and B also owed him a sum of money: B thereupon placed money and property in the hands of the defendant to provide for paying the note and the debt, and upon that consideration the defendant promised the plaintiffs to make such payment. The court said this was an original contract on an independent consideration received by the defendant. *Farley v. Cleveland* (4 Cow., 432, and *S. C. in error*, 9 Cow., 639), already mentioned, was entirely similar. The plaintiff held the note of one Moon, which the defendant promised to pay in consideration of fifteen tons of hay sold to him by Moon. The promise was held to be not within the statute. The reporter's note truly expresses the principle of the decision. It is as follows: "Where a promise to pay the debt of a third person arises out of some new consideration of benefit to the promisor or harm to the promisee, moving to the promisor, either from the promisee or the original debtor, such promise is not within the statute of frauds, although the original debt still subsists and remains entirely unaffected by the new agreement." In *Chapin v. Merrill* (4 Wend., 657), the promise was not within the statute, because it was not collateral to any debt or liability of a third person to the promisee. The third person proposed to contract a debt with fourth parties; and the plaintiff agreed to guarantee that debt, the defendant at the same time agreeing to indemnify him for so doing. The plaintiff might have invoked the statute, if his guaranty had not been in writing. But the defendant was his indemnitor merely. It was a contingent liability, of necessity original, because there was nothing to which it could be collateral. There was no debt of the third person to the plaintiff. The case, therefore, had not even the formal resemblance to the present one, which, existing in other cases, has misled the plaintiff's counsel. The cases of *Gardiner v. Hopkins* (5 Wend., 23), *Elwood v. Monk* (*Id.*, 235), *King v. Despard* (*Id.*,

277), and *Meech v. Smith* (7 *Id.*, 315), are, all of them, in principle, with differences of detail, like *Farley v. Cleveland* (*supra*) In each of them, the consideration of the new promise moved to the defendant, proceeding either from the original debtor or the creditor, and the decisions were placed distinctly on that ground.

It cannot fail to be seen, that nearly all the cases which have been mentioned, in fact all of them which exhibit a promise to pay or answer for the debt of another person, are essentially of one type. With great variety in the circumstances, one controlling characteristic pervades them all. In every instance, the consideration of the promise was beneficial to the person promising. This was the feature which imparted to the promise the character of originality, as that term is used with reference to the statute of frauds. In not one of them is it true that the undertaking was entered into upon a consideration merely beneficial to the debtor but of no concern to the promisor; and I can confidently say that not one of those cases contains even a *dictum* which, being understood, countenances the doctrine contended for on the part of the plaintiff in this case. The principle involved is the same which runs through other cases that have not been cited. For example, A, holding the note of B, transfers it to C, upon a consideration moving from C to him, and with a parol guaranty of the payment. This, in a merely formal sense, is a promise to answer for the debt of the maker of the note, and it has been strenuously contended that such a promise is within the statute. But the rule is otherwise; it being considered that such transactions, however close to the letter, are not within the intent of the statute; because they have their root in a new dealing which concerns the promisor, and in a new consideration which moves to him. *Brown v. Curtiss* (2 Comst., 225) was such a case, in which Judge BRONSON remarked: "This belongs to the third class of cases mentioned by KENT, Ch. J., in *Leonard v. Vredenburg*: there was a new and distinct consideration independent of the debt of the maker, and one moving between the parties to the new promise. Such are also the cases of *Johnson v. Gilbert* (4 Hill,

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178), and the very recent one in this court of *Cardell v. McNeil*, decided at the last term (*ante*, p. 336).

I have not yet referred to the case of *Slingerland v. Morse* (7 Johns., 463), which seems to be much relied on; but it does not present the question now before us. The plaintiff had distrained the goods of his tenant for rent, but did not remove them. Thereupon the defendants signed a writing in these words: "We do hereby promise to deliver to Peter Slingerland all the goods and chattels contained in the within inventory in six days after demand, or pay the said Peter \$450." Looking at the face of that writing, it is only surprising that any one could ever think it was within the statute of frauds. In its very terms it was original, and not collateral. It discloses no debt of any one else than the defendant who signed it. Looking outside of it, we learn there was at least a claim made for rent due from another person, but it is quite obvious that, as a substitute for that claim, the creditor accepted the original promise of the defendant to deliver the goods or pay a sum of money. This is the evident import of the agreement itself, for it recognizes no continuing debt or liability of the tenant, nor does it undertake to pay his debt or answer for him in any way. The goods were the fund. The defendant took them under his own control (a fact which the agreement assumes), and upon that consideration made himself the primary debtor, and not the guarantor or surety. I think the case was well decided, although it is very obscurely and scantily reported.

So far, then, we find no cases or *dicta* in point. Yet it would not be true to say that the plaintiff's position is wholly unsupported by any authority in the courts of this State. In *Mercein v. Andrus* (10 Wend., 461), SAVAGE, Ch. J., made this remark on a motion for a new trial: "The judge correctly stated to the jury that where the promise of one person to pay the debt of another was founded upon the consideration of surrendering up property levied on by an execution, the promise was an original undertaking, and need not be in writing to be valid." Of course, no such point was decided, because the decision granted a new trial upon another question not mate-

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rial to the present inquiry. The Chief Justice cited no authority. If he meant to lay down the doctrine, that a new consideration, moving from the creditor to the debtor, the debt still remaining, would sustain the unwritten promise of another person to pay the debt, there was no authority to be cited, for no such proposition had ever been advanced in this State. If, however, the charge at the trial and the observation of the Chief Justice assumed, as the law was, that the levy of an execution extinguished the debt, and that the release of the levy remitted the creditor to the new promisor as his only remedy, then the remark was strictly correct, but it has no application to this case. Such is probably the true explanation; and we shall presently see there are English cases under the statute standing on that ground. The plaintiff's counsel has been able, however, to cite one case which is entirely to his purpose. In *Fay v. Bell* (Lalor's Supp. to Hill and Denio, 251), the plaintiff had a lien on a pair of boots which he had mended, and in consideration of releasing that lien and giving up the boots, the defendant promised to pay his demand, which amounted to fifty cents. So far as appears, the debt still remained. The case went up from a justice's court, through the Common Pleas, to the Supreme Court, where the question was disposed of with the single observation that the promise was "a new undertaking, founded on a new and distinct consideration, the relinquishment by the plaintiff of his lien on the boots, and which was sufficient to uphold the promise made." The remark, as made, is strictly true. The consideration was clearly sufficient to uphold the promise, but the statute of frauds requires not only a consideration but a writing. The case was of very slight importance, and the principles of the question were not examined. In the same book is another case, precisely the other way, the opinion being given by another judge. In *Van Slyck v. Pulver* (Lalor, 47), the promise was made in consideration that the plaintiff would suspend proceedings on an execution against his debtor. This forbearance was admitted to be a sufficient consideration, and it was certainly a new one; but the promise was held void within the statute.

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In all the judicial history of this State, then, there is but one adjudged case which sustains the doctrine contended for, and that is one entitled to no great consideration. I will now refer to several of a very decisive character, which furnish a true exposition of the statute, and show that the rule is the other way. One case I have just mentioned, which is directly in point, and is of a date comparatively recent. Going back to an early day, in *Simpson v. Patten* (4 Johns., 422), the plaintiff forebore to sue his debtor, and upon that consideration the defendant promised to pay the debt as soon as he could sell a piece of land which belonged to the debtor. The promise was held void within the statute of frauds, the court observing. "A promise to pay the debt of a third person must be in writing, notwithstanding it is made on a sufficient consideration." I have some hesitation in citing *Jackson v. Rayner* (12 Johns., 291), because it seems to me to have gone too far. The defendant had received an assignment of the debtor's property, and upon that consideration, as well as forbearance, the defendant promised to pay the demand. The court regarded the unconditional promise as evidence that the fund was adequate. Upon the discrimination made in the later cases (heretofore cited), the conveyance of the property to the defendant was a new consideration, moving to him from the debtor, and made the promise an original one. Nevertheless, on the ground that the original debt still remained, the promise was held void under the statute. In *Smith v. Ives* (15 Wend., 182), the declaration was on a written guaranty of a note, the consideration alleged being forbearance to sue the maker. Plea, that no consideration was expressed in the writing. The plea was held good; the court saying: "Forbearance has never been considered a new consideration passing between the newly contracting parties, so as to take the case out of the statute." In *Packer v. Wilson* (15 Wend., 348), a guaranty of the same nature, and upon the same consideration, was again held to be void. In *Watson v. Randall* (20 Wend., 201), these propositions were expressly affirmed: 1. An agreement to forbear to sue a debtor is a good consideration for the promise of a third person to pay

the debt, but, to render the promise obligatory, it must be in writing. 2. While the debt remains a subsisting demand against the original debtor, the promise of a third person is collateral, and must be in writing. In *Barker v. Bucklin* (2 Denio, 45), a new trial was ordered, upon a point not now material; but the present question was quite fully examined by Mr. Justice JEWETT. According to his views, the promise in this case is clearly void. If I were to criticise his opinion, I should say he goes somewhat too far, by reason of not discriminating so as to uphold promises where (the original debt still remaining) the new consideration moves from the creditor to the promisor, as well as from the primary debtor. In *Kingsley v. Balcome* (4 Barb., 131), the principal cases were reviewed by Mr. Justice SILL, and his conclusion is thus stated: "The true rule is, that the new original consideration spoken of must be such as to shift the actual indebtedness to the new promisor, so that, as between him and the original debtor, he must be bound to pay the debt as his own, the latter standing to him in the relation of surety." I do not think this a perfect definition of an original promise to pay a sum for which another was previously bound as the primary debtor, because, as I have shown, there are many cases which such a definition does not include. The more we examine the original classification of Chief Justice KENT, in *Leonard v. Vredenburg*, the more we shall find it the result of a profound and masterly view of the subject; it being necessary, however, to the completeness of his definition, that the new or original consideration may move to the promisor as well from the debtor as the creditor, the fundamental requisite being that such consideration must not be one wholly existing or moving between the debtor and the creditor.

These numerous authorities are decisive. They all present examples where the collateral undertaking was founded on a consideration sufficient to sustain the promise, but of no personal concern to the promisor; yet the promises were void, because they fell within the precise terms and the undoubted policy of the statute of frauds. Certainly, that statute was not enacted for

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cases where the promise would be void at the common law for want of a consideration to sustain it. If it was not enacted for the very cases where a new consideration arises, additional to the original debt, that being insufficient according to all authority, then why was it ever passed? Indeed, the struggle in the courts has been to withdraw from its influence, not such cases as these, but others having a close formal resemblance, yet distinguishable, not because there is a consideration, but because it moves to the promisor, and so gives to his undertaking an original character. A person who receives a consideration may be bound by any lawful promise founded upon it, and that promise may as well lie to pay another man's debt as to do any other act. The success of this struggle, in a variety of instances not within the intent of the statute, should not overthrow the very object for which it was enacted.

This discussion would be incomplete without referring to the rule elsewhere than in this State. I have already mentioned the case of *Nelson v. Boynton* (3 Metc., 396), which may be regarded as settling the question in Massachusetts. The creditor in that case sued his debtor and seized his property under an attachment. The defendant promised to pay the debt in consideration of a discontinuance of the suit. The suit was discontinued accordingly, and the lien of the attachment was thereby lost, but the debt remained against the original debtor. It was held, upon the fullest consideration, Chief Justice SHAW giving the opinion, that the promise was void because it was not in writing. I regard the decision as of great value, because the cases were examined, and the discrimination between the different classes was made with entire accuracy.

Upon the argument of the present case, a passage from an English text-book was read (Addison on Contracts, p. 88), to the effect that, if the creditor has a lien or security which he is induced to part with on the faith of a promise of another person to pay the debt, the promise so made is not within the mischief intended to be provided against by the statute of frauds, and may be good by parol. This extract, according to its apparent meaning, seemed to indicate that in England the

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statute of frauds was essentially disregarded. The authorities referred to by the writer to sustain the proposition, are: *Barcker v. Birt* (10 Mees. & W., 61); *Haigh v. Brooks* (10 Ad. & E., 309-385); *Barrell v. Trussel* (4 Taunt., 117); *Meredith v. Short* (1 Salk., 25); *Castling v. Aubert* (2 East., 325); and *Walker v. Taylor* (6 Carr. & P., 752). I have looked at these cases, and find that none of them have the slightest connection with such a proposition, except the two last, which are alike, and do not sustain it. In the last case, the creditor had the possession and a lien upon certain licenses as a security for his demand, and he gave them up to the defendant, who promised to pay the debt. The case was at *nisi prius*. TINDAL, Ch. J., said: "It is a new contract, under a new state of circumstances. It is not, 'I will pay, if the debtor cannot;' but it is, 'in consideration of that which is *an advantage to me*, I will pay you this money.'" "There is a whole class of cases in which the matter is excepted from the statute on account of a consideration arising *immediately between the parties*." Here is the very distinction so well established in our own cases. It should be added, that the text-writer referred to could not have intended what his language apparently means; for he adds, in the same connection: "In these cases, the plaintiff must so shape his case as not to show or admit that there is a principal debtor liable, and that the promise of the defendant is a promise to pay that debt."

The early case in England, of *Williams v. Leper* (3 Burr., 1886), is cited and relied on to sustain the plaintiff's position; and it is, perhaps, the only one in the English courts capable of a misinterpretation. But the case does not, in fact, sustain any such doctrine, and it has never been so understood in the courts of that country. One Taylor owed the plaintiff £45 for rent. He conveyed all his effects for the benefit of his creditors, who employed Leper, the defendant, to sell them; and he advertised them for sale accordingly. The plaintiff then came to distrain, and the defendant promised to pay the rent if he would not distrain; and he desisted accordingly. Lord MANSFIELD said the defendant was a trustee for all the creditors,

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and was obliged to pay the landlord, who had the prior lien. Justice WILMOT said the defendant became the bailiff of the landlord, and, when he had sold the goods, the money was the landlord's in his own bailiff's hands. Therefore, he said, an action would have lain against the defendant for money had and received to the plaintiff's use. Justice YATES said, it was an original consideration to the defendant. Justice ASTON thought the goods were a fund between both, "and on that foot he concurred." From the reasoning of these judges, it seems to me perfectly evident that, if the tenant had not assigned his goods, and the defendant had no connection with them as trustee or otherwise, but the plaintiff had simply released his distress, or right to distrain, for the benefit of the debtor alone, the promise to pay the debt on that consideration would have been held within the statute. But as the facts were, the law would imply an obligation on the defendant's part to pay over the money to the plaintiff after selling the goods; and where the law will imply a debt or duty against any man, his express promise to pay the same debt, or perform the same duty, must, in its nature, be original. The distinguishing feature of the case was, that the creditor relinquished his distress, not to the debtor, but to other creditors of the same debtor who beneficially owned the goods, and the defendant was the representative of those creditors, having the fund in his possession. If this early case had not been sometimes misapprehended, it is probable that no doubt would ever have arisen in questions like the one before us.

The cases also cited, of *Houlditch v. Milne* (3 Esp., 86), *Castling v. Aubert* (2 East., 325), *Edwards v. Kelly* (6 M. & Sel., 204), *Bird v. Gammon* (3 Bing., N. C., 883), *Bampton v. Paulin* (4 Bing., 264), *Walker v. Taylor* (6 Carr. & P., 752), and *Stephens v. Pell* (2 Crompt. & Mees., 710), differing only in immaterial circumstances, all involved the same general principles as *Williams v. Leper*. In each of them the creditor relinquished some lien or advantage incident to his debt; but in each of them, whatsoever he relinquished was acquired by the defendant—either as a matter of personal interest and concern to himself or to

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other parties whom he represented—and on that consideration he promised to pay. In none of them was any such doctrine asserted as the plaintiff contends for in this case. In all of them the engagement was deemed original, either because the primary debt was gone or because the consideration moved to the promisor; and in some of them the decision was put on both these grounds. These cases not only elucidate more perfectly the principle of *Williams v. Leper*, but they are in themselves illustrations of the distinction which, as we have seen, is recognized in our own courts. Referring now to *Read v. Nash* (1 Wilson, 305), it was the case of a promise to pay to the plaintiff a certain sum if the latter would withdraw his record in an action of assault and battery against another person, and would not proceed to trial. This promise was held not to be within the statute of frauds; the decision being placed on the ground that the person sued for the assault was not a debtor at all within the meaning of the statute, and could not be so considered until after verdict against him. "For aught we can tell," the court said, "the verdict might have been in his favor." The promise, therefore, stood as at the common law. In *Goodman v. Chase*, a debtor, taken on a *ca. sa.* at the suit of the plaintiff, was discharged with the plaintiff's consent on the defendant's promise to pay the debt. This was held an original promise, because the debt itself was extinct and satisfied by the *ca. sa.* and its discharge; and the principle of the decision is a very plain one.

I have now referred to all the decisions in the English courts which can be supposed to favor in any degree the doctrine on which the plaintiff in this case relies; and I think it may be safely affirmed, that no case has ever been determined in those courts tending to the proposition that a parol promise to pay the debt of another person is valid where the consideration is beneficial only to the debtor, and where there is a debt which still remains against him. I will now mention a few cases, among many others, which show what the law of England is upon the precise question now to be decided.

In *Fish v. Hutchinson* (2 Wilson, 94), the plaintiff had com-

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menced a suit against his debtor, and the defendant, in consideration that he would stay that suit, promised by parol to pay the debt. The whole Court of King's Bench were of opinion that the undertaking was void by the statute of frauds; observing that there was a debt still subsisting against another person and a promise to pay it. The consideration was manifestly good, but that, moving as it did to the debtor only, did not sustain the promise without a writing. This case was decided just one hundred years ago, and the principle of it was never departed from in succeeding times. Coming down to a recent period, in *Clancy v. Piggott* (2 Ad. & Ellis, 473), one Moore was indebted to the plaintiff, for which the latter held his goods in pledge. In consideration of surrendering the pledge to the debtor, the defendant promised, by a writing which did not express the consideration, to pay the plaintiff his debt. *Williams v. Leper*, and the other cases above referred to, belonging to that class, were cited to sustain the undertaking; but the court held it within the statute and void. *Williams v. Leper*, and the kindred decisions, were not overruled, or even questioned, and the case, therefore, shows how those decisions are understood in England. In *Tomlinson v. Gell* (6 Ad. & Ellis, 564), the plaintiff's client was indebted to him for costs in a pending chancery suit, and in consideration of a discontinuance of that suit, the defendant promised to pay those costs to the plaintiff. Held void within the statute. PATTERSON, J., observed: "It is said that a new consideration arose from the discontinuance of the suit. But I do not think it is a new one. The cases on that point are where something has been given up by the plaintiff, and acquired by the party making the promise, as a security of goods for a debt."

Without pursuing this discussion further, the general rule is, that all promises to answer for the debt or default of a third person must be in writing, whether the promise be made before, at the time, or after the debt or liability is created. Such is the rule, because so is the statute of frauds. The statute makes no exception of any promise which is of that character. The courts have made no exceptions; as clearly they should not.

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But a considerable variety of undertakings, having points of resemblance and analogy to such promises, have been held not to be within the statute. These may be chiefly, if not wholly, arranged in the following classes: 1. Where there was no original debt to which the auxiliary promise could be collateral; for example where the promisee was a mere guarantor for the third person to some one else, and the promisor agrees to indemnify him, or where his demand was founded in a pure tort. 2. Where the original debt becomes extinguished, and the creditor has only the new promise to rely upon; for example where such new undertaking is accepted as a substitute for the original demand, or where the original demand is deemed satisfied by the arrest of the debtor's body or a levy on his goods, the arrest or levy being discharged by the creditor's consent. 3. Where, although the debt remains, the promise is founded on a new consideration which moves to the promisor. This consideration may come from the debtor, as where he puts a fund in the hands of the promisee, either by absolute transfer or upon a trust, to pay the debt, or it may be in his hands charged with the debt as a prior lien, as in the case of *Williams v. Leper*, and many others. So the consideration may originate in a new and independent dealing between the promisor and the creditor, the undertaking to answer for the debt of another being one of the incidents of that dealing. Thus, A, for any compensation agreed on between him and B, may undertake that C shall pay his debt to B. So A, himself being the creditor of C, may transfer the obligation to B upon any sufficient consideration, and guarantee it by parol. If we go beyond these exceptional and peculiar cases, and withdraw from the statute all promises of this nature, where the debtor alone is benefited by the consideration of the new undertaking, and the debt still subsists, then we leave absolutely nothing for the statute to operate upon.

The judgment should be affirmed.

SELDEN, DENIO, CLERKE and WELLES, Js., concurred.

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BACON, J. (Dissenting.) This case presents a single question, and a proposition apparently so simple that the first emotion is perhaps one of surprise that there could be any question in regard to it, since, in the multitude of decisions with which the books are filled touching the construction of the statute of frauds, it would seem that the rule applicable to a case which, in its essential features, must so often have arisen, must be settled by authority. My own conviction is, that the rule which governs this case has been long and well established, in opposition to the conclusion of the referee and the judgment of the Supreme Court; but, at the same time, it may readily be admitted that reservations and doubts have been suggested, and discriminations attempted, from time to time, that, if they have served no other purpose, have at least involved the matter in some obscurity.

"Every special promise to answer for the debt, default or miscarriage of another person," the statute declares "shall be void, unless such agreement, or some note or memorandum thereof, expressing the consideration, be in writing and subscribed by the party to be charged therewith." (2 R. S., 185, § 2.) This statute, as is well known, is an almost literal transcript of the English statute of frauds (29 Charles II., ch. 8); the only noticeable change being, that in our statute the consideration is required to be expressed in the writing. This, however, so far as the construction of the two statutes is concerned, is of no special moment, inasmuch as the courts, both in England and in this State, had held, before the words were inserted in the section as it now stands, that it was necessary to a valid agreement that the consideration should, in some terms, be incorporated therein. Whatever, then, has, by the course of adjudication in England upon this clause of the statute, been deemed or acquiesced in as the settled law, must be accepted, with us, as controlling authority, unless, upon due consideration, and by the solemn judgment of some court whose decisions are recognized, any peculiar and special construction has been questioned or repudiated.

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It would probably have been better if there had been less of what may, perhaps, without irreverence, be called legal, and even judicial tampering with the words of the statute, to force, at times, a construction seemingly at war with its natural and more obvious import. But all regrets on this subject are vain, since the business of construction began with the infancy of the law, and has not yet ceased, and will doubtless attend it even down to old age. One of the earliest attempts to create and define a distinction by which agreements were to be held within, or without, the scope of the statute, was to express them by the terms "original" and "collateral." It is true that neither of these words is to be found in the statute, but they have been so long employed in connection with it as to have attached to them an established and recognized meaning; and the struggle always is, in determining the validity of such an agreement as seems to fall within the general purview of the law, to ascertain whether it is collateral and ancillary to the principal contract, having no aliment whatever independently of that, or whether it can be sustained and enforced as an independent, original undertaking, altogether outside of, and, therefore, not needing to be evidenced by, the written agreement required by the statute.

An attempt was made, as early as 1811, by Chancellor KENT, then Chief Justice of the Supreme Court, in the well known case of *Leonard v. Vredenburg* (8 John., 29), to arrange into three classes the cases where a promise, to be answerable for the debt of another, was within, or without, the statute. They are familiar to the profession, and for a long time stood their ground as a just exposition of the law. The third class, in which he held that a promise to pay the debt of another was not within the statute "when it arose out of some new and original consideration of benefit or harm moving between the newly contracting parties," has been subjected to much criticism; and it may be fairly admitted that it is not now, in the naked and unqualified terms in which it is expressed, to be received as the true construction of the statute. And yet this rule did obtain, and was followed in several well considered cases in

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our own courts. Thus, in *Farley v. Cleveland* (4 Cow., 432), the classification of KENT was stated and reaffirmed, and the case then on argument held to fall within his third class; and the court lay down the broad proposition, that, where a promise to pay the debt of a third person arises out of some new consideration of benefit to the promisor, or harm to the promisee, moving to the promisor either from the promisee or the original debtor, such promise is not within the statute. And it is added, that this is so, although the original debt still subsists, and is entirely unaffected by the new agreement. This case was carried up to the Court of Errors, and was there affirmed. (9 Cow., 639.) The doctrine of the Supreme Court is reiterated in the precise language of the marginal note in the 4th of Cowen, and by an entirely undivided court; the report merely stating that JONES, Chancellor, examined the question, and was of opinion that the judgment should be affirmed; "whereupon, *per totam curiam*, the judgment was affirmed."

In *Meech v. Smith* (7 Wend., 815), the same rule is again repeated, and the court say that it has long been settled, that, although the promise be by parol, yet, if it arises out of some new and original consideration of benefit or harm moving between the newly contracting parties, the case is not within the statute. Alluding to *Leonard v. Vredenburg*, and the above cited case of *Farley v. Cleveland*, the court say: "This rule has been recognized by all writers upon contracts, and by the highest court in the State, and is, therefore, as much the law of the land as the statute itself." The authority of *Leonard v. Vredenburg*, and especially the third class of Chancellor KENT, has been cited approvingly and followed in the courts of several of our sister States; and in the case of *De Wolf v. Rabaud* (1 Peters, 476), the judgment of the Supreme Court of the United States proceeded substantially upon an affirmance of the authority of *Leonard v. Vredenburg*, as a just construction of the statute of this State.

If these cases are to be received as approved law at the present day, they decide more than enough to reverse the judgment now before us; and there need be no further exami-

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nation of authorities upon the discussion which this case has opened. But it is important to a just appreciation of the ground upon which, as I suppose, the agreement in this case, and the consequent right of the plaintiff to recover, is to be upheld, to notice the several cases in which the discrimination between original and collateral promises has been established, or affirmed, by the courts. This discrimination will be found to exist, I think, and the requirements of the statute not to apply, under four conditions, within some one of which most of the authorities upon this particular section of the statute, and which, in some respects, have been thought to conflict with each other, may be arranged.

1. Where the primary agreement has been in effect extinguished, and the promise superseded, by the new agreement and promise which have taken their place, and the credit is given wholly to the new promisor.

2. Where a fund has been provided, or property has been placed in the hands of the newly contracting party, from which the means are to be procured to pay, or the promisor derives an equivalent or advantage therefrom.

3. Where the purport and intent of the agreement is to accomplish the payment of the promisor's own debt, although the effect is to pay the debt of another, and where that debt is used to measure the extent of the liability, as where A owes B, and C is indebted to A, and in consideration of that liability promises, at A's request, to pay B the debt A is owing him.

4. Where the creditor, in consideration of the promise, surrenders some pledge, or relinquishes some lien actually held by him and capable of enforcement, and by means of which the original debt was rendered secure.

In all these classes, excepting the first, it does not affect the liability of the newly contracting party that the original debt subsists and the liability of the debtor remains in full force. Wherever the conditions exist which I have arranged under these four heads, there is not only a sufficient consideration for the promise to pay another's debt, but the promise is good although by parol.

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Numerous illustrations might be gathered from the authorities under these several heads; and although it must be admitted that the current of decisions is not uniform, and some apparently irreconcilable cases may be found, I am persuaded that a careful sifting of the facts, and an attention to the proper discriminations which should be made, would reconcile many which stand seemingly in conflict, and in the result make this branch of the law more homogeneous and reliable. At present, however, it only concerns us to trace the course of decisions which have established the distinction expressed under the fourth head of exceptions to the operation of the statute; and if it shall be found, as I think it will, a distinction fully recognized and upheld by a long and almost unbroken series of decisions, the right of the plaintiff to recover upon the facts of this case will be put beyond question.

And, first, as to the condition of the English law upon this subject. One of the earliest cases to be found in the books is *Tomlinson v. Gill*, decided by Lord HARDWICKE, in 1756, and reported in Ambler, 330. That case was briefly this: Gill, the defendant, promised the widow and administratrix of the intestate that, if she would permit him to be joined with her in the letters of administration, he would make good any deficiency of assets to discharge the debts of the intestate; and the action was brought by a creditor to enforce that agreement. The defendant insisted that the promise was void by the statute of frauds. It was holden to be not within the statute. Here was the relinquishment by the widow of a part of her exclusive lien upon and interest in the goods and effects of her husband, and which were a fund in her hands for the payment of the debts of the estate, and the defendant, by the agreement, acquired that interest. Lord HARDWICKE goes even further than this in his decision, wherein he says it is not within the statute, "for there is," he adds, "a distinction between a promise to pay the original debt and on the foot of the original contract, and where it is on a new consideration. Here is quite a new consideration."

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There is a short case reported in Salkeld, standing apparently upon the same ground. It was to this effect: The sheriff took goods upon an execution, and a stranger promised the officer to pay the debt in consideration that he would restore them. The action was brought upon that promise, and on demurrer it was held to be a good consideration. No benefit, so far as the case discloses, accrued to the promisor, the goods being restored to the debtor; but the consideration which upheld the promise, and which was good as an original undertaking, was the relinquishment of the lien which the sheriff had upon the property by virtue of the levy under his execution. (*Love's case*, 1 Salk., 28.) It is true that the statute of frauds is not called in question in this decision, but the case clearly presented that objection, which would, beyond doubt, have been urged if either the counsel or the court had deemed it tenable.

The next case, and the one, perhaps, most frequently cited and commented on in connection with the particular question we are considering, is *Williams v. Leper* (3 Burr., 1886), and reported also more briefly in 2 Wilson, 308. The case was tried before Lord MANSFIELD, at Guildhall, and a verdict taken for the plaintiff upon the following state of facts: One Taylor was indebted to the plaintiff in the sum of £45 for rent of premises he held of him as his landlord. Taylor, becoming insolvent, conveyed his property to the defendant, Leper, for the benefit of his creditors. Leper took possession, when the plaintiff came, as landlord, to distrain for the rent due him; whereupon Leper promised that, if he would desist from distraining, he would pay the debt. The plaintiff, accordingly, in consideration of this promise, refrained from enforcing his distress, and the action was brought upon that agreement. In the Court of King's Bench, all the judges gave brief opinions. Lord MANSFIELD said, emphatically: "The case has nothing to do with the statute of frauds. The landlord had a legal pledge. He enters to distrain, and has the pledge in his custody. The defendant agrees that the goods shall be sold, and the plaintiff be paid in the first place. The goods are the fund.

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Leper was obliged to pay the landlord, who had the prior lien." The other judges concurred in the result; but Justice ASTON was inclined to put it upon the footing that the goods were a fund and Leper the bailiff of the landlord, and when he had sold the goods the money was in his hands substantially as the landlord's agent. The case may, perhaps, be safely maintained upon that special ground, and is thus an authority within what I have ventured to designate as the second class of promises not within the statute; but I think the language of Lord MANSFIELD presents very clearly the ground of the distinction to be, that the plaintiff had, in consequence of the promise of defendant, relinquished a lien operative and efficient to produce satisfaction of the debt, and that it is a very ample authority to support the validity of such a promise upon that consideration.

The case of *Houlditch v. Milne* (3 Esp., 86), presents the point more clearly, and is a very decisive authority on the proposition we are discussing. The plaintiff had repaired carriages for one Cofey, and charged the account to him. The defendant sent an order to have them packed and sent on board a ship, and promised to pay the bill. On the trial, the defendant's counsel asked that the plaintiff be nonsuited, on the ground that the promise being to pay a debt of Cofey, who was himself liable, and not being in writing, it was void by the statute. But Lord ELDON refused to nonsuit the plaintiff, and held that it was an original undertaking. He cited the case of *Williams v. Leper*, saying that it appeared to apply precisely to the case then before him. "The plaintiff," he adds, "had, to a certain extent, a lien upon the carriages, which he parted with on the defendant's promise to pay. This took the case out of the statute, and made the defendant liable."

Castling v. Aubert (2 East., 825), presented the following facts: The plaintiff was a broker, and had in his hands policies of insurance upon which he had a lien for certain acceptances he had given for one Grayson. The defendant, upon the plaintiff delivering him the policies that he might collect them, promised that he would provide for the acceptances as they

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became due. The plaintiff, being prosecuted on one of his acceptances, brought this suit to recover of the defendant upon his promise. It appeared that the defendant had collected the policies. This was held to be an original undertaking, and not within the statute. It is true that it presented another ground upon which the recovery could be sustained, to wit, that the defendant had possessed himself of the fund created for the express purpose of meeting the debt, and this would sustain a count for money had and received. Lord ELLENBOROUGH puts it in both aspects, and says, at the close of his opinion, citing *Williams v. Leper*, that he agrees with that decision to the full extent of it. "I agree," he says, "with those of the judges who thought the case not within the statute at all, and I also agree with the ground on which Mr. Justice ABRON proceeded, that the evidence sustains the count for money had and received."

A distinction had crept into the books founded upon a remark of BULLER in *Matson v. Wharam* (2 Term R., 80), to the effect that, if the person to whose use goods are furnished or property delivered is liable at all, any other promise by a third person to pay that debt must be in writing, otherwise it is void by the statute of frauds; and upon this distinction the case of *Croft v. Smallwood* (1 Esp., 121), was decided. But this distinction was repudiated in the cases already cited, in all which it is manifest that the original debt was still subsisting and remained unaffected by the new undertaking; and in this State that precise point has been expressly adjudged in the case of *Farley v. Cleveland*, heretofore referred to, and in *Rogers v. Kneeland* (18 Wend., 114).

The principle of the cases I have thus cited has been affirmed, and the doctrine fully recognized, in two or three modern English cases; among which are, *Edwards v. Kelly* (6 M. & Selw., 204); *Bird v. Gammon* (8 Bing., N. C., 883); and *Walker v. Taylor* (6 Carr. & Payne, 752), which is, perhaps, the most recent one, and is to the following effect: The widow of a publican employed an undertaker to conduct the funeral of her deceased husband, and deposited with him the licenses of the

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house as a security for the payment of his bill. A, one of a firm who supplied the house with liquors, took out letters of administration on the estate, and B, the other partner, promised the undertaker that, if he would give up the licenses to him, he would pay the funeral expenses. It was held that the undertaker, having surrendered the licenses, might recover his bill against B, although the widow was his employer and he had charged the administrator as his debtor. TINDAL, Ch. J., said, on the trial: "Here is a new contract, under a new state of circumstances. It has nothing whatever to do with the statute of frauds."

In view of these authorities, I think it may be safely affirmed that the rule in England is too well settled to admit of question that the promise in this case is not within the statute of frauds. No case that fairly holds the contrary has been produced, or even referred to, on the argument; and so well established does this doctrine seem to be, that the elementary writers substantially concur in the principle derived from them. Thus Chitty says: "Although the debt of another form the subject matter of the defendant's undertaking, still, if he promised to pay the debt upon some new consideration raised by himself, and the consideration be *the resignation of a charge or lien which afforded a remedy*, or fund, to enforce the payment, the case does not fall within the statute." (Chit. Cont., Springfield ed. of 1851, p. 446.)

Thus, also, Burge on Suretyship, 26, expresses in substance the same proposition: "Though the debt of another may have been the original cause of the promise, yet, if the person to whom it is made *relinquishes some right or advantage which he possessed*, and which might have enabled him to obtain satisfaction of his debt, the promise by a third party to pay the debt in consideration of such relinquishment is an original promise, and not within the statute." (See, also, Fell on Guar., chap. 2, §§ 7, 8, to the same effect.)

The rule is, perhaps, still more clearly and strongly stated by Addison, in his recent treatise on Contracts, who, on a collation of the authorities, both ancient and modern, states his

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conclusion in the following terms: "A contract or promise, although made concerning the debt or default of a third party, may yet be an original promise, not within the statute. If the plaintiff has a lien upon the property of his debtor in his possession, or holds securities for the payment of his debt, and is induced to *give up the lien*, or part with his securities, upon the faith of the defendant's promise to pay the debt, the promise so made is not within the mischiefs provided against by the statute, although the amount promised to be paid, on the surrender of the securities, may be the *subsisting debt* of the third party due to the plaintiff, and the possession of the promise may have the effect of discharging the debt." (Add. on Cont., 38, 39.)

To the English cases above cited and commented on, I add that of *Barrell v. Trussell* (4 Taunt., 117), where the same point is adjudged. It was a case where the plaintiff was about to sell the property of one Abbott, under a bill of sale executed to him by Abbott. Having taken the property, the defendant, in consideration that the plaintiff would relinquish the possession to Abbott, promised verbally to pay the plaintiff £122, being the debt of Abbott due to the plaintiff, and to collect which the plaintiff was about to make the sale. The plaintiff obtained a verdict, but, on a rule to show cause, the defendant insisted that the plaintiff was not entitled to recover because this was an agreement to answer for the debt of another, and there was no signature of the party sought to be charged. The counsel for the defendant, on the argument, insisted that there was no benefit derived to the defendant, as there was no delivery of the goods to the defendant; but HEATH, J., said: "There was a detriment moving to the plaintiff, which is a good consideration; for in consequence of his forbearance, the goods were afterwards taken and sold on an execution against Abbott." At a subsequent day the rule was discharged, MANSFIELD, Ch. J., saying: "What is this but the case of a man who, having the absolute power of selling goods, refrains upon the request of another? It is not a promise to pay another's debt."

The cases decided in this State, with perhaps an occasional

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exception, affirm the same rule, even if they do not carry the doctrine somewhat further. It will be sufficient for our present purpose, however, if they shall be found to be substantially in accordance with the English cases. I will examine them very briefly:

Slingerland v. Morse (8 Johns. R., 463), is the earliest reported case where this question was presented. The plaintiff in that case had distrained the goods of his tenant for rent. The defendant agreed that he would deliver the goods in six days, or pay the amount of the rent, and thereupon the distress was abandoned and the goods left with the tenant. This was held to be an original, and not a collateral undertaking, and that no writing was therefore necessary. It was decided, substantially, upon the authority of *Williams v. Leper*. It has been said, in regard to this case, that it may perhaps be sustained on the ground that the goods were a fund in the hands of the defendant, from the possession of which his liability resulted. But, in answer to this, it is only necessary to say, that no such reason is given for the decision, and in the case it is expressly stated that the goods were left with the tenant.

The cases of *Skelton v. Brewster* (8 John., 376), and *Gold v. Phillips* (10 *Id.*, 412), I do not cite in this connection; for, although they both recognize the doctrine of Chancellor KENT in *Leonard v. Vredenburg*, and hold the promise good because it was founded upon a distinct consideration arising between the newly contracting parties, yet, as in both cases property had been delivered to the defendant to enable him to discharge the debt, they do not fall within that precise class to which this case belongs.

The case of *Chapin v. Merrill* (4 Wend., 657), was an agreement to indemnify another for becoming the guarantor of a third; and it was held not to be within the statute, and is in point to show that it is not necessary that the defendant should receive any benefit from what was done by the plaintiff, the consideration in that case being purely harm to the plaintiff.

Jackson v. Raynor (12 John., 291), is sometimes cited as conflicting with the prior cases of *Skelton v. Brewster* and *Gold*

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v. *Phillips*, and with the distinction I am seeking to illustrate. It clearly does not with the latter, for no lien was surrendered or benefit waived by the plaintiff. The case came fairly within that class where the agreement is valid by reason of property being placed in the hands of the promisor to pay the debt, in consideration of which he agrees to discharge it. The court put the decision, however, upon the express ground that the original debt was still subsisting; a distinction which is no longer recognized. There cannot be a doubt that, on the precise state of facts disclosed in that case, the decision would now be the other way.

In the case of *Gardiner v. Hopkins* (5 Wend., 28), the plaintiff had a lien upon the sheets of a law-book he was printing for one Wiley, and the defendant promised that, if he would deliver the sheets, he would pay the balance of his account—the claim against Wiley still remaining in force. The case, as stated, leaves it a little uncertain whether the delivery was made to Wiley, or to the defendant, who was his assignee. The decision proceeded upon the ground that the plaintiff gave up what was claimed to be a valid lien, and the defendant derived a benefit from the surrender by obtaining the property. It is not a case proceeding upon the simple ground of a lien surrendered; although, if that had been the only feature presented, I think it clear the verdict would have been sustained.

The case of *Mercein v. Mack & Andrus* (10 Wend., 461), presented the precise point. The plaintiff had a levy by virtue of an execution upon the property of one Reed; and one of the defendants agreed that, in consideration of the release of the levy, the defendants would pay the plaintiff \$150 at the expiration of some eighty days, or give their note for that amount. The judge at the trial ruled that a promise founded upon the consideration of surrendering up property levied on by execution is an original undertaking and need not be in writing; and on the other ground, of the partnership liability, he left it to the jury to say, upon the evidence, whether the firm was bound by what had been shown upon that point. A new trial was granted for a misdirection of the court upon this branch of the

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case; but upon the other, Chief Justice SAVAGE stated that the ruling was right, and that a promise made upon such a consideration as appeared in the case was not within the statute of frauds. In reference to this case, it is said, in the able opinion of the Supreme Court given in the present case at the general term, that what was said by Judge SAVAGE in his decision on this point was entirely *obiter*, and that he cited no authority to support his conclusion. I cannot agree with the learned justice who gave the opinion, on this point. So far from the remark being *obiter*, the precise question was presented. If the ruling at the circuit had been wrong, that would have been an end of the case, and a new trial would have been, perhaps, unnecessary on the other ground. If, however, it was to be sent back, it was equally necessary to determine the other question, which was vital to the maintenance of the action itself; and as to the remark that no authority was cited, the Chief Justice probably deemed that the doctrine had been so often and well settled as to have become almost elementary, and requiring no array of cases to sustain it.

Indeed, so well had the rule been established, that in the case of *Smith v. Weed* (20 Wend., 184), the point was not even raised by the counsel on the argument. It presented the case of a naked parol promise of a third person to pay the debt to the plaintiff, in consideration of the release of an attachment which the plaintiff had levied on the property of his debtor; and the court held, without any hesitation, that the lien was valid, and the release thereof constituted a sufficient consideration for the undertaking of the defendant to pay the debt. Being an original promise, it was, of course, not within the statute.

The last case which has arisen in our courts where this precise question has been presented, is, *Fay v. Bell* (Lal. Supp. to Hill & Denio, 251). The decision is brief, but emphatic, and is given by an able and eminent judge, who, until his recent lamented decease, continued, with intellectual vigor unimpaired, and "natural force" almost unabated, by his large learning and ripened experience, to enlighten the tribunal over which

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he once presided. The facts were briefly these: One Daharch had employed the plaintiff to mend a pair of boots. The work had been done, and the boots remained in the possession of the plaintiff, and he had, of course, a lien for the amount of his charge. Upon the promise of the defendant to pay the demand, the boots were delivered to Daharch. There was a recovery, and on appeal it was insisted that the promise was within the statute of frauds; but the court held otherwise. BEARDSLEY, J., who gave the decision, enters upon no argument to vindicate it. He simply says: "It was a new undertaking, founded on a new and distinct consideration, to wit, the relinquishment by the plaintiff of his lien on the boots, and which was sufficient to uphold the promise made. It was not within the statute of frauds." He then adds the authorities, some ten or twelve in number, among which are several we have particularly considered. Here, then, is an opinion *not obiter*—not unsustained, but fortified by authority, and presenting a state of facts absolutely identical with the case now before us. The decision has never been questioned or doubted by any succeeding case; and I propose to abide by it, as a clearly expressed, well considered and authoritative exposition of the law, and which determines the present case in favor of the plaintiff. Whatever we might be disposed to say of this as an original question—(and, were I at liberty to view it as such, I confess I should find difficulty in so construing the language of the statute as to exempt these cases from its operation)—I think the current of authority has too long and steadily set in one direction to be now turned aside, and that the rule stands too firmly, not only "*super antiquas*," but "*super novas vias*," to be disturbed.

I need scarcely add, that the cases of *Barker v. Bucklin* (2 Denio, 45), and *Brewster v. Silence* (4 Seld., 207), to which we have been referred by the defendant's counsel, hold no doctrine whatever inconsistent with the great "cloud of witnesses" that have been summoned to the stand. The former case was where property had been sold to the defendant, in consideration of which he promised to pay the debt of the party delivering the

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property, to the plaintiff. It was not a promise to pay the debt of a third party merely, but was, in effect, an agreement to pay the defendant's own debt. The case was rightly decided upon all the authorities, and it was unnecessary to go beyond this simple and plain proposition to uphold the recovery. The case of *Brewster v. Silence* is purely that of a naked written guaranty to pay another's debt, expressing no consideration. The court held that the consideration could not be supplied by parol proof. There was no pretence that, in consideration of the undertaking, any lien was surrendered or right relinquished which the plaintiff held, and which was operative in his hands. Some evidence was attempted to be given on the trial that the property was placed in the hands of the defendant, on which fact his undertaking was founded; but the Court of Appeals held that this was not only outside of the issue, but that the evidence given did not conduce to prove the point sought to be established. This case also finally settled the doctrine which had been floating loosely through the Reports, that a guaranty could not be changed into a promissory note so as to charge the party by some other contract than the one he had in fact entered into; but beyond this, and the other proposition that a guaranty which does not express the consideration is void under the statute of frauds, the case is not to be invoked as authority. The decision is not, therefore, in conflict with the rule which is to be applied to this case, which is controlling upon the question before us.

My opinion is, that the judgment should be reversed, and a new trial granted, with costs to abide the event.

DAVIES and WRIGHT, Js., concurred in this opinion.

Judgment affirmed.

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THE OSWEGO STARCH FACTORY v. DOLLOWAY *et al.*

91	449
136	441

The location, for the purposes of taxation, of a manufacturing corporation organized under the general act (ch. 40 of 1848), is the place designated in its certificate as that where the operations of the company are to be carried on.

It is immaterial that the principal office or place for transacting the financial concerns of the company is located in a different town.

For the purpose of taxing corporations under the statute, as amended in 1857 (ch. 456 of 1857, § 3), its stock is to be assessed at its actual value, whether above or below the nominal par, and this irrespective of its possessing any surplus capital or reserved funds.

So held, where such a corporation had no surplus or reserved funds, but made annual dividends of all its profits, amounting to fifteen per cent and upwards, and the company was assessed for its capital at a valuation of seventy-five per cent above par.

APPEAL from the Supreme Court. Action against the assessors of the city of Oswego, for an alleged illegal and excessive taxation of the capital stock of the plaintiff upon the tax-rolls of the city and county of Oswego, in consequence of which it had been subjected to taxes amounting to over \$9,000, for the non-payment of which its property, to the value of \$15,000, was sold by the collector. The trial was before a referee, who found these facts: The plaintiff is a manufacturing corporation, organized under the general act (ch. 40 of 1848), by the filing, in March, 1848, in the office of the Secretary of State and of the clerk of the county of Oswego, a certificate in duplicate, stating, among other things, that it was formed "for the purpose of carrying on the manufacture of starch in the city of Oswego," and that "the operations of the said company shall be carried on in the city of Oswego." Immediately after its organization, the company purchased lands in the city of Oswego and erected thereon buildings and machinery for the manufacture of starch, at an expense of about \$300,000. It employed there, in the manufacture, about 300 persons, and used, annually, from 200,000 to 250,000 bushels of corn.

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Four of the five trustees of the company resided, and always have resided, at Auburn, in Cayuga county. The president, secretary and treasurer of the company resided at Auburn, and kept an office there, for which the company paid rent. The meetings of the board of trustees were held at Auburn: the agent at Oswego, usually twice a week, forwarded to the treasurer at Auburn an account of sales made, and the same were entered by him upon the sales book, and the collections for sales were transmitted to the treasurer by the purchasers; or the treasurer drew on the purchaser through the Cayuga County Bank in Auburn: the raising and furnishing of funds for carrying on the business was at Auburn: the bank account there was large, some years amounting to nearly \$1,000,000. The referee found other facts tending to show that Auburn was the seat of the financial transactions of the company.

In 1857, the defendants, the assessors of the city of Oswego, assessed the plaintiff's real estate at \$160,000. They deducted this amount from the nominal value of the capital stock, \$450,000, leaving \$290,000, and assessed the value of the said \$290,000 at 75 per cent above par; making, as the assessment of the plaintiff's personal property, \$507,500. No assessment was made for surplus profits or reserved funds. The referee found nothing as to the value of the stock, in point of fact; holding that the assessors having jurisdiction to make the assessment, its extent is matter for their judgment, and that they would not be liable for error in exercising it. The evidence, however, showed that there was no surplus capital or reserved funds, but that all the profits were divided annually, and that no dividend had been less than fifteen per cent.

The referee found, as matter of law, that the plaintiff was legally taxable for personal property in Oswego, and not elsewhere, even if the principal office for transacting its financial concerns was in Auburn.

Judgment was entered upon his report for the defendants, which having been affirmed on appeal at general term in the

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fifth district, the plaintiff appealed to this court. The case was submitted on printed arguments.

John Porter, for the appellant.

W. T. Curtis and *Charles Rhodes*, for the respondents.

DENIO, J. The plaintiff's counsel maintain that there should have been a recovery in the Supreme Court upon two grounds: first, because the corporation was not liable to taxation on personal property at Oswego, but could only be assessed at Auburn; and, secondly, that it was improperly assessed the sum of \$217,500 beyond the amount of its capital, after deducting the value of its real estate; whereas, as they insist, it was only liable to taxation on the nominal amount of its capital over and above the deductions for real estate. A question has been made, whether the defendants were liable to this action for their acts as assessors, assuming that the plaintiffs are right in their positions above mentioned; but the conclusions at which we have arrived render it unnecessary to express an opinion upon this last point.

1. We think the corporation was legally assessed and taxed, at Oswego. The act authorizing the creation of corporations for manufacturing purposes (Laws 1848, ch. 40), requires that the certificate of incorporation should state (among other particulars), "the names of the town and county in which the operations of the company are to be carried on;" and the certificate under which the plaintiff's corporation was formed, accordingly declares that the operations of that company shall be carried on at the city of Oswego, in the county of Oswego; and it appears that the plaintiff in fact erected the manufactory there, and that all the business of manufacturing was carried on in that city. A portion of the books were kept at the treasurer's office at Auburn, and the general financial affairs were transacted there. If our judgment depended upon the relative proportion of the pecuniary business which was managed at one or the other of the two localities, it would be

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necessary to examine more critically the several particular facts found by the referee in order to ascertain whether they warrant his general conclusion, that the place for transacting the financial concerns and the principal office of the company was at Oswego; but being of opinion that the plaintiff could not, within the sense of the provision of the Revised Statutes to be presently mentioned, have any principal office for transacting its financial concerns except at Oswego, we do not pass any judgment upon the question of fact referred to.

The Revised Statutes contain the following provision as to the place of taxing the property of corporations: "The real estate of all incorporated companies, liable to taxation, shall be assessed in the town or ward in which the same shall lie, in the same manner as the real estate of individuals. All the personal estate of every incorporated company, liable to assessment on its capital, shall be assessed in the town or ward where the principal office or place for transacting the financial concerns of the company shall be; but if such company have no principal office or place for transacting its financial concerns, then in the town or ward where the operations of such company shall be carried on." (1 R. S., 389, § 6.) This provision applied to all incorporations liable to taxation on their capital then existing, and to all such as should thereafter come into existence, whether their charters, or the certificates under which they were incorporated, when formed under general acts, confined them to any locality or not. The greater number of them were incorporated for carrying on some financial or industrial enterprise in some particular city or town, and this circumstance of locality was a part of their legal constitution; but a great many were of a character which did not permit them to be confined to any one local division of the State. Navigation companies, turnpike companies, and canal companies, were of this class, and also bridge companies spanning rivers dividing separate local jurisdictions, and some others whose business was of a general nature. In the aggregate, these corporations, unattached to any particular town or city, were very numerous. Without some special provision to meet the case, it would be

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impossible to determine in what place they were to be assessed in their capital; but as all property of joint stock corporations was to be taxed somewhere, there would be great uncertainty as to the place of taxation in such cases, and they might be assessed in the several towns or cities through which their operations extended; and this would be likely to produce a conflict among the different jurisdictions, and to cause much inconvenience to the companies, as well as to the public. It was to remedy this inconvenience, that the provision under consideration was enacted. It was not necessary to limit it, in terms, to those companies having no seat in a particular town or city, for it was assumed that the other class of corporations, namely, those having a fixed residence, would probably have a principal office for conducting their financial business in the town where they were located; and if they did not, the general language at the close of the section would meet their case.

• The plaintiff's position would require us to hold that a bank or insurance company, chartered to carry on its business in a particular town, for instance in the city of New York, could lawfully establish its financial office in some neighboring town—suppose in the county of Westchester—and in that manner remove its residence, as regards its liability to contribute to the public burdens, to that suburban jurisdiction and deprive the municipality, of whose local administration it enjoyed the benefit, of any contribution towards the expenses of the local government. We are of opinion that when the legislature, by the act of incorporation, or the associates, by their certificate or articles executed pursuant to a general law, have attached the corporate body to a particular local division of the State, whether it be a city, town, or entire county, it cannot establish such a principal office as is intended by the provision of the Revised Statutes, which has been quoted, out of such city, town or county.

The general statute, authorizing the formation of corporations of the character of the plaintiff in this action, did not contemplate the creation of companies having no specific location in some town or city. The statement which was required

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to be contained in the certificate, and which was actually inserted in the certificate under which this corporation was organized, was intended to serve the same purpose as the declaration usually contained in special acts of incorporation, in which it was stated that the business was to be carried on in a particular town or city. The location established by the certificate could not be changed at the pleasure of the directors or trustees, any more than the corporate name, the period of existence, or the objects for which the company was formed or the amount of its capital stock. All these particulars, required to be stated in the certificate, became portions of the legal constitution of the corporation. Some of them, as the kind of manufacturing, and the amount of the capital, might be changed by a vote of the stockholders (§§ 21, 22); but there does not appear to be any power, short of the legislature, which would enable them to alter the seat of the corporation. It is not intended to state that every corporate act must necessarily be transacted in the particular locality. On the contrary, such business as the exigency of its affairs requires to be transacted in other parts of the State, or out of the State, may be so transacted; but, under this general power, it could not change its residence by establishing its principal office in another place.

The Western Transportation Company, respecting which a question lately came before us, as to the place where it was to be taxed, was formed under a general act which provided for the incorporation of navigation companies. That species of business could not generally be carried on in a single local jurisdiction, and, hence, such a company could not be located in any city or town in the manner adopted in respect to manufacturing corporations, by requiring its certificate to state the place where its operations should be carried on. If no statement of any locality had been required, the provisions of the Revised Statutes would have applied to the case, and the assessors would have been obliged to inquire where, in point of fact, its principal financial office had been established. To avoid the necessity of such an inquiry, which might have been

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attended with difficulty in some cases, the act required the certificate to state "the name of the city or town and county in which the principal office for managing the affairs" of the company should be situated (Laws of 1854, p. 518); and the certificate for the formation of the Western Transportation Company located the office at Tonawanda. We held that the company could be taxed on its capital only in that town. (*Western Trans. Co. v. Sheu*, 19 N. Y., 408.) So far from this being an authority in favor of the position of the plaintiff, as is claimed, we think it shows the correctness of the judgment of the Supreme Court in the present case. In both these general acts, the legislature undertook to provide for the locating the residence of the companies in some particular city or town, in order to provide against the uncertainty which might arise from its being left to be ascertained as an open question of fact, respecting which conflicting judgments might be formed. As a single place could easily be assigned to a manufacturing corporation, the certificate to create such companies was required to state the town or county where its operations should be carried on; but, as the operations of a navigation company were not generally local, the associates in those companies were compelled to designate, and state in the certificate, the locality of their principal office for managing their affairs. In either case, the city or town fixed upon and duly stated in the certificate became the legal residence of the company, and the place where it was to be taxed for personal property; and it cannot be changed by establishing an office or transacting any portion of their business elsewhere. This is, substantially, the point decided in the case referred to.

2. We are next to determine whether the plaintiff could be legally assessed for a greater amount than the nominal capital after making a deduction for its real estate. The assessors considered the stock to be worth a premium of seventy-five per cent on its par value, and assessed the plaintiff accordingly. The authority for this, if it exists, is found in the laws of 1857 (ch. 456, § 3). The section is as follows: "The capital stock of every company liable to taxation, except such part of it as

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shall have been excepted in the assessment roll, or shall have been exempted by law, together with its surplus profits or reserved funds, exceeding ten per cent of its capital, after deducting the assessed value of its real estate, and all shares of stock in other corporations actually owned by such company, which are taxable upon their capital stock under the laws of this State, *shall be assessed at its actual value*, and taxed in the same manner as the other real and personal estate of the county."

The term, "actual value," is evidently used in distinction to the nominal value or amount. The direction to assess it at the actual value, therefore, required that it should be estimated above or below the par amount, according to the fact, and as the particular case might require. This is the natural meaning of the language employed, and the interpretation it should receive, unless there is something in the other statutes relating to the taxation of corporations which satisfactorily shows that it was used in another sense. All the laws upon this subject are in *pari materia*; and it is quite legitimate to claim an examination of them to ascertain the bearing and intention of a particular provision in any one of them.

By the Revised Statutes, corporations deriving an income from their capital or business, with exceptions to be afterwards mentioned, were taxable for the amount of their capital, not invested in real estate, as so much personal property, without regard to its market or productive value or the consideration whether it had been increased by the accumulation of a surplus or diminished by losses or otherwise. (1 R. S., 414, §§ 1, 2, 6; *The Bank of Utica v. The City of Utica*, 4 Paige, 399.) Manufacturing and turnpike corporations were to be assessed on a different principle, namely, on the "cash value of the stock," after the same deduction for real estate purchased as in the above case; which value, the act declares, is "to be ascertained by the assessors by the sales of the stock or in any other manner." (§ 7.) If the valuation should be considered by a taxpayer as too high, the right was given in the next section to have it reduced to the sum which should be sworn to in an affidavit to be made by a proper officer of the company. We

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have here presented two distinct principles of taxation, applied to different kinds of corporations, the discrimination being doubtless based upon some public motive. There was another discrimination, founded upon the different purposes for which the corporations were formed. Any company might be wholly exempt from taxation by showing, by the affidavit of one of its officers, that it was not in the receipt of any income or profits (§ 9); but, in addition to this privilege, common to all the corporations, manufacturing and marine insurance companies were allowed to commute by paying five per cent on the amount of their profits, if the whole profits did not exceed five per cent on their capital (§ 11); and turnpike, bridge and canal companies were to be wholly exempt, unless their incomes exceeded five per cent on their capital. (§ 12.)

In 1853, the foregoing arrangement was changed in several important particulars. In the first place, the total exemption of companies which could show that they had not received any profits was abolished. Then the discrimination between the different kinds of corporations, founded on the nature of their business, was abandoned, and all were to be taxed upon a single principle; and that principle was, to assess them for the amount of their capital, with the usual deduction for the portion invested in real estate, and, in addition, for the amount of their "surplus profits or reserved funds." But, instead of the total exemption in terms extended to companies which did not make profits, all the taxable corporations were allowed to commute by paying five per cent on their profits when these did not exceed five per cent on the capital; adopting, in that respect, the provision which the Revised Statutes had applied to manufacturing and marine insurance companies. (Laws 1853, ch. 654.)

This system continued until the passage of the act of 1857, containing the section under immediate consideration. By this last mentioned act, the principle of commutation is definitively abandoned; and the idea of total exemption having been given up in 1853, it seemed necessary, in the opinion of the legislature, to establish some other system by which investments in

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corporations which should prove unprofitable should not be taxed by the same rule which was applied to those which were productive of large gains. The unyielding rule of assessing the par amount of the stock was unsatisfactory, because it made no allowance for unfortunate investments, nor for losses of capital, on the one hand, or for surplus profits, or the advantage of a lucrative business, on the other. The plan fixed upon was the same which had been applied to manufacturing and turnpike companies, by the 7th section of the title of the Revised Statutes which has been referred to. The stock was to be assessed at its actual value. The language of the 7th section is, cash value; but we cannot suppose that any change was intended by the slight difference of phraseology. The Revised Statutes suggested that this value was to be arrived at by the sales of stock, or in some other manner; while the act of 1857 is silent as to the means which the assessors are to take to determine the value. The plaintiffs do not claim that the words, "actual value," mean the same thing as the par or nominal value; and it seems to me perfectly plain that they were used in opposition to that idea. There is nothing else which they can mean, except the real business valuation, which is precisely the same thing as the market price; and this was, undoubtedly, what the legislature had in view. But as the market price of a particular stock is sometimes above par, as it is also often below, the legislature, by adopting that measure of value, must have intended to subject the fortunate holders of a profitable stock to a proportionably high assessment towards the public burdens; while they, at the same time, exempted, in the same proportion, those who had an unprofitable stock. It is obvious that this principle is not precisely so applied to individuals, who are generally obliged to pay the same taxes upon the positive amount of their property, whether it is profitably or unprofitably employed, or remains idle. But there is a just motive for this discrimination, though it is not at first apparent; for one who invests money in a corporate enterprise ceases to own it, and the resulting estate, which he receives in the form of corporate stock, is, for all the ordinary

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business purposes for which property is used, of a value equal to the market price, and no less or more. But, however this may be on principle, the practice of discriminating between money invested in corporate stock and that which remains under the control of the proprietor, has prevailed from the time that stocks were first subjected to taxation.

The plaintiff's position is, that the act of 1857 provides for a reduction of the assessment of corporations where the stock is not of the value of the money which it represents, but not for an increase where it is of greater value. This is argued to follow from the consideration that the provisions in the Revised Statutes and in the act of 1853, for an exemption from taxation in the case of profitless corporations, and for a reduced rate of taxation by means of commutation where the profits were small, looked solely to the relief of these institutions, and never to the charging them with increased burdens. It is conceded that, both by the act of 1853 and that of 1857, the surplus profits accumulated and not divided are to be taxed *eo nomine*, and this, it is argued, is the only way in which corporations can be assessed for a greater amount than the nominal capital. But the present case shows that a corporate enterprise may be so happily chosen, or so skillfully conducted, as to render the stock of much greater value than the money invested. We think the legislature have very plainly expressed their will, that where such is the case, such companies must contribute towards the public charges according to the measure of their good fortune, or, in other words, to the value of their stock. There is, doubtless, an incongruity in including the accumulated profits above ten per cent in the assessment, where the capital is assessed at its market value. It does not seem to have occurred to the law-makers that the existence of a surplus enters into the market value of the stock, and that this surplus is never the subject of an ownership or disposition distinct from the stock, and that their whole object was accomplished when they directed the stock to be assessed at its actual value. This incongruity does not practically embarrass the present case, as there were no surplus profits in the hands of this corporation;

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but the enhanced value of the stock arises wholly out of its ability to make large profits. But in a case where a surplus exists, which must be included in the amount of the assessment, justice will be attained by deducting its amount from the sum at which the stock would be estimated if the surplus was considered as embraced in the valuation.

A few words seem necessary upon another argument, arising out of the provisions of prior statutes, which has been much urged by the plaintiff's counsel. When the exemption from taxation prevailed in the case of an entire absence of profits, and a commutation where the profits were small, the facts were to be arrived at by the affidavits of the parties claiming the exemption, and the practice was the same where individuals claimed that their property was over-valued. (1 R. S., 416, §§ 9, 13; *Id.*, 392; § 15.) In the year 1851, this was changed, in respect to individuals, by requiring the applicant for a reduction to submit himself to an examination, after which the assessors were to determine the value according to their judgment upon the facts disclosed (Laws 1851, p. 332); and in 1857, and cotemporaneous with the passage of the section immediately in question, this change was applied to corporations complaining of an over-valuation, by declaring that the term, "persons," in the act of 1851, should be held to apply to corporations. (Ch. 536.) The result of this is, that where the real estate or the stock of a corporation is claimed to be over-valued, the officers can present themselves for examination for the purpose of showing the justice of their claim. The argument deduced from this by the plaintiff's counsel is, that inasmuch as the claim of an individual who seeks to be examined under the statute is always for a reduction, and as the assessors have no right to increase the valuation, whatever the effect of his answers may be, when the same practice of an examination was applied to corporations by the act of 1857 last referred to, the jurisdiction of the assessors, acting on the result of the testimony, must necessarily be the same; that is to say, they may reduce the valuation if the evidence establishes an over-valuation, but they cannot increase it if the tendency of the

evidence should be the other way. We think this argument quite inconclusive. The assessors are to assess the stock, in the first place, at its actual value, according to their judgment. Then the officers of the company may present themselves for examination, and should their answers disclose that the valuation ought to have been greater, and not less, than the amount set down, it may be that the roll cannot be changed; but this by no means shows that the assessors have not a right, in the first instance, to set down the true value, though it exceeds the nominal amount, of the stock. It might, with equal force, be argued that, because the assessment of an individual cannot be increased upon a review of the roll whatever may be shown by the examination of the tax-payer, the assessors ought not, in the first instance, to assess it at what they conceive to be its actual value.

In the last place, it is said that the act of 1853 prescribes the form of the assessment roll, and directs, among other things, that the amount of the capital stock of a corporation, paid or secured to be paid, shall be set down in one of the columns of the roll (Laws, p. 1240, § 1), and that this is not changed by the act of 1857. That act, it is true, does not go into detail as to the form of the roll; but if the intent be clear, as we think it is, to assess the capital at its real, as distinguished from its nominal value, the form can easily be accommodated to give effect to the intention. Such a reconciling construction is often required to be given to remedial and administrative statutes, which are sometimes drawn up in haste, and without prescribing the manner in which the directions of the legislature are to be carried out.

It is objected, on the part of the plaintiff, that the assessment for personal property was added to the roll after the time when, by the statute, it should have been completed, and that, therefore, the addition was unauthorized. But the report of the referee does not sustain this objection. The statement is explicit, that the notice required by law was given on the 1st day of July, and that this was after the rolls had been completed.

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It follows, from these views, that the judgment of the Supreme Court should be affirmed.

All the judges concurring,

Judgment affirmed.

21	462
118	616
21	462
147	285

CORNWELL *et al.* v. HAIGHT.

The defendant contracted to sell and deliver rye, corn and oats at stipulated prices, and upon the plaintiffs giving security for payment. After delivering the rye without any security, and receiving payment thereof, he refused to deliver the other grain, upon the ground that the plaintiffs' failure to give the security discharged the contract: *Held*, that the defendant's conduct was a waiver of the terms of the contract in respect to the grain delivered, and that the plaintiffs tendering security for the residue were entitled to damages for the non-performance of the contract.

It seems, that the refusal of the defendant upon such an avowed ground is a repudiation of the contract, and relieves the plaintiffs from the obligation to show a tender of performance on their part.

APPEAL from the Supreme Court. Action for damages from the non-performance by the defendant of a contract for the sale and delivery of grain. Upon the trial, before Mr. Justice WATSON, the plaintiffs proved these facts: On the 20th of January, 1847, the defendant sold to the plaintiffs 2,500 bushels of grain, consisting of rye, oats and corn: 300 bushels of rye at 67 cents a bushel, 600 bushels of corn at 64 cents, and 1,600 bushels of oats at 32½ cents. The grain was to be delivered at Chatham Four Corners, at the railroad station, and the delivery was to commence the next day. \$20 was paid by the plaintiffs to bind the bargain. The defendant did not wish pay for every load as delivered, and it was understood that the plaintiffs might not be at the station as each load arrived. It was also arranged that the plaintiffs should procure one Lord to become security for the performance of the contract on their part. Haight delivered about 280 bushels of

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rye, and was paid then on account of grain \$175. The defendant then refused to deliver the remainder of the grain called for by the contract, on the ground that the plaintiffs had not given the security contemplated by the contract, at the time the first delivery was made under it. The defendant admitted that he had received more than enough to pay for all the grain then delivered by him. The plaintiffs then demanded of the defendant the fulfillment of the contract, offering to pay him in advance, or that they would give the security agreed on if requested by the defendant. The defendant refused, and neither made nor tendered any further delivery.

Upon the conclusion of the evidence, the plaintiffs were nonsuited and took an exception. Judgment thereupon was affirmed at general term in the third district, and the plaintiffs appealed to this court.

Amasa J. Parker, for the appellants.

John H. Reynolds, for the respondent.

DAVIES, J. A reference to the opinion delivered in this court when the cause was here before, reversing the judgment of the Supreme Court in favor of the plaintiffs, and granting a new trial, will show that such reversal was made upon the ground of error in the charge of the judge who tried the cause. He had charged the jury that if the defendant had delivered the rye or any part thereof, after he had a right to exact security by the terms of the contract, he had waived the security, and had no right to exact it as to the oats and corn, not delivered. This was held to be erroneous by this court. It was said that it was clear that the defendant might waive the performance of the stipulation, but that it by no means followed, because he chose to deliver a part of the property sold without exacting the security, he waived it altogether. It was added that "the utmost effect of the defendant's partial delivery was to waive the condition as to the property actually delivered, but that he had a right at any time in the progress of the de-

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livery to stop and insist upon the performance of the plaintiffs' engagement to give security." We are to regard, then, the defendant as having dispensed with the requirement of security so far as the rye was concerned. That part of the contract may be regarded as having been performed to the mutual satisfaction of the parties, or it may be considered as entirely out of the case. What then were the rights and duties of the parties as to the residue of the contract; or, assuming the contract to relate only to the oats and corn, in reference to that contract? That was all of the original contract which remained unperformed, and it may be regarded as an independent contract. As the proof now stands, the plaintiffs required performance on the part of the defendant, and offered the security agreed upon, or to pay in advance the contract price of the corn and oats. The defendant refused to perform on his part, not upon the ground that the plaintiffs did not offer to do all they had agreed, but upon the ground that not having given security as to the rye, the whole contract fell through, and the defendant was excused from performing the residue of the old contract or the independent one. In this view the judge at the circuit manifestly concurred, in nonsuiting the plaintiff. But a slight consideration of the point presented will show it to be untenable. Assuming, as we may, that the contract as to the rye was an independent contract, and had been fully executed in accordance with the agreement and to the satisfaction of the parties, then the defendant's position is this: "the plaintiffs not having performed another contract in the precise manner it was agreed it should be performed, though the precise form of performance has been waived by mutual consent, and a different performance accepted, yet I am discharged in consequence from performing another agreement with the plaintiffs, although they are ready and offer to perform it on their part in exact conformity with its terms." It can be hardly necessary to add that such a defence cannot avail the defendant. As this court held in this case, the security was only waived as to the rye delivered; as to the oats and corn the defendant had the right to exact the security, and the same being tendered by the

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plaintiffs, no excuse is shown for non-performance of the contract on his part. The plaintiffs have proved more on this last trial than they were called on to establish to entitle them to recover. They were under no obligation to make a tender of the security; it was enough that they were ready at the time and place appointed for the performance of the contract, to receive the corn and oats, and give the security. (*Coonley v. Anderson*, 1 Hill, 523; *Bronson v. Wiman*, 4 Seld., 182-188.)

The time then appointed, so far as relates to the oats and corn, may well be held to be that at which the interview between the parties took place after the delivery of the rye. Even, therefore, if the plaintiffs under the circumstances could have been required to have been ready at the time and place, to have performed on their part, it is quite clear that they were so, and intended strictly to have complied with the terms of their contract. But readiness or a tender on the part of the plaintiffs were not necessary under the facts disclosed in this case. It is quite clear that the defendant had previously made up his mind not to comply with the contract; and readiness and a tender by the plaintiffs under such a state of facts would have been an idle ceremony. The acts and declarations of the defendant were equivalent to notice to the plaintiffs that he did not intend to comply with the terms of the contract on his part and perform it. A tender, therefore, by the plaintiffs of the security, was not called for. (*Orary v. Smith*, 2 Comst., 60.)

The judgment appealed from should be reversed, and a new trial ordered, with costs to abide the event.

WELLES, J. Assuming that, by the contract, the plaintiffs were bound to give security for the payment of the purchase money of the grain before any part was delivered, the defendant had waived the security so far as the rye was concerned, which was all paid for. Then, the price having advanced on corn and oats, and the defendant having been overpaid on the rye delivered, the plaintiffs offered, among other things, to give security for the payment of the corn and oats. The defendant refused to receive the security, or to deliver any

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more of the grain. This refusal relieved the plaintiffs from any obligation to tender the security formally, as that would then have been an idle ceremony. The conduct of the defendant, in delivering the rye without security and afterwards receiving the pay for it without objection, was calculated to throw the plaintiffs off their guard, and to lead them to suppose that the corn and oats would be delivered in like manner; and on the first intimation afterwards that the defendant made a point of having security, they offered to give it, and we are to assume that they were ready to do so, and would immediately have given it in pursuance of this offer, if the defendant had not then put himself upon the ground that the plaintiffs had forfeited their right to demand the delivery of any more grain.

For these reasons, I think the judgment of the Supreme Court should be reversed, and a new trial granted.

All the judges concurred; COMSTOCK, Ch. J., and WRIGHT, J., however, only in the result.

Judgment reversed, and new trial ordered.

21	466
110	561
21	466
158	482

RATHBONE v. MCCONNELL *et al.*

In an action for the diversion of water, the complaint alleging the plaintiff to be the owner and in possession of land, and entitled to the benefit of the stream which had run and flowed upon it, and of right ought to do, a general denial of each and every allegation presents no claim of title so as to give costs to the plaintiff under § 304 of the Code when he recovers less than \$50 damages.

Nor does a claim of title arise from an allegation in the answer that the diversion was "with the leave, license, permission and consent of the plaintiff first made, given and granted," for the purpose of feeding an aqueduct for the supply of a village. These words do not import any grant, but a parol license.

APPEAL from the Supreme Court. Action for diverting a water-course. The pleadings are sufficiently stated in the fol-

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lowing opinions. There was a trial, and a verdict for the plaintiff for \$25. The clerk, upon the adjustment of costs, did not allow them to the plaintiff, but allowed costs to the defendants. This decision was reversed at special term, but, on appeal, this judgment was reversed at general term in the seventh district, and costs awarded to the defendants. The plaintiff appealed to this court.

Washington Barnes, for the appellant.

Francis Kernan, for the respondents.

DENIO, J. The Code gives costs to the plaintiff on a recovery in the Supreme Court for any amount "in an action for the recovery of real property, or, when a claim of title to real property arises on the pleadings, or is certified by the court to have come in question on the trial." (§ 304.) The present was an action to recover damages, and not property; and there was no certificate as to the questions litigated on the trial. If, therefore, the plaintiff is entitled to costs, it is because a claim of title to real property arose on the pleadings. I am of opinion that the pleadings do not show any such claim of title, by either of the parties, within the sense of the enactment. The complaint charges the defendants with diverting the water of a stream which formerly ran through a piece of land owned by and in the possession of the plaintiff, by means of channels or sluices cut in the banks of the stream above his land. The first answer is, a general denial of the allegations of the complaint. This would compel the plaintiff to prove the possession which he had alleged, and this proof would entitle him to maintain the action, if he could also prove the injury. The defendants did not set up any title to the plaintiff's close, and could not have been permitted to prove any, under these pleadings. It is not to be intended that the plaintiff would undertake to give any other evidence of ownership than that which he alleged, to wit, possession, or that any question of paper title would be litigated on the trial. That no question of title

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within the acts respecting costs, was presented under such circumstances, has been decided in two cases. (*Ehle v. Quackenboss*, 6 Hill, 597; *Brown v. Majors*, 7 Wend., 495.)

The second answer sets up ignorance, in the form prescribed by the Code, as to the plaintiff's owning or being in possession of the close mentioned in the complaint. This puts in issue one of the matters embraced in the general denial; and if that general denial did not raise a question of title, this special one does not. The third answer is foreign to the question; it being only a denial of the acts of diversion imputed to the defendants.

The fourth and last answer sets up that the defendants' acts were done with the leave, license, permission and consent of the plaintiff, first made, given and granted, and that, under such leave, license, &c., the defendants and other persons constructed an aqueduct to conduct water from a certain spring to supply the inhabitants of the village of Howard with water. The action being brought for damages for the alleged diversion up to the time of the commencement of the action, and not for an injunction against its continuance, or to establish the plaintiff's right to the water alleged to be diverted, the only answer which the defendants were obliged to interpose was a sufficient legal excuse for what they had already done. It was no ways essential that they should have an estate in the land benefited by the easement, or that their right should extend, in point of time, a moment beyond the time of the commencement of the suit. Although a mere revocable license would be enough to establish a defence, still they might have set up a grant, or a title by prescription, of a right to divert the waters of the stream, if such was the nature of their claim. This would have been an easement burdening the plaintiff's premises for the benefit of the lands, for the advantage of which the diversion was made. If such a grant or prescription had been set up, it would have entitled the plaintiff to costs under the provision on that subject in the Revised Statutes. (2 R. S., 613, § 8.) And I am of the opinion that the same construction ought to be given to the section of the Code under consideration, though the language is much less explicit. (*Heaton v. Fer-*

ris, 1 John. R., 146; *Eustace v. Truthill*, 2 *Id.*, 185; *Tunnickliff v. Lawyer*, 8 Cow., 382; *Chandler v. Duane*, 10 Wend., 563.) But the defendant did not set up any grant or any title by prescription. The language, like most of that used by pleaders under the present system, is extremely loose and vague. But it is sufficient to set forth a simple license, and quite insufficient as an averment of an estate. Laying aside the idea of a prescription, which is not alluded to in the answers, I do not find any intimation of a grant. Such an instrument must be in writing, and there must be parties, grantor and grantee, and it must be under seal. The former system required that it should be pleaded with a profert. Although that form is not now necessary, and no great precision on any subject is required, still, when we are asked to understand a pleading as setting out a grant, we ought at least to find some allusion to an instrument of some kind. The words used in this answer—leave, license, permission and consent—suggest the idea of a verbal communication, and, by a strong implication, negative the notion of a deed. The words made, given and granted, which are added, and which qualify the first mentioned words, do not enlarge the idea. The latter word, which is relied on, is obviously used in a popular and not a technical sense. It agrees very well with leave, permission, &c., which may properly be said to be granted.

Again, a grant of such an easement as is supposed to be set up in this answer must, to be valid, be annexed to some other estate in land, to which it becomes appurtenant. If conferred personally upon one who has no other estate, it may operate, by way of covenant, but does not constitute a title; and it is nowhere intimated that the defendants owned or were possessed of any land upon which the water could be diverted. I am, therefore, of opinion that the answer should be understood, as I have no doubt it was intended, as setting up a verbal license to do what the complaint alleges the defendants have done. It has been repeatedly decided that the defence of license to do an act upon land does not involve a question of title within the sense of the provisions respecting costs.

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(*Otis v. Hall*, 3 John., 450; *Chandler v. Duane*, *supra*; *Wickham v. Seeley*, 18 Wend., 649.) And I am not aware that the contrary has ever been held.

I am the more persuaded that no injustice is done to the plaintiff by construing his pleading as I have done, by the consideration that if there had been any real question of title on trial, a certificate of the judge would have been obtained, which would have been equally effective as an issue upon the title in his pleadings. Relying, as the plaintiff does, upon the pleadings alone, I am bound to say that he has failed to establish a claim to costs, and I think they were rightly awarded to the defendants. I am, therefore, in favor of affirming the judgment of the Supreme Court.

COMSTOCK, Ch. J., SELDEN, DAVIES, WRIGHT, and WELLES, Js., concurred.

BACON, J. (Dissenting.) The only question presented by this case is, whether the plaintiff is entitled to costs against the defendants, and that depends upon the question whether a claim of title to real property arises upon the pleadings. The complaint was for injury to the plaintiff by reason of the permanent diversion of a stream of water from the lands of the plaintiff where it had been accustomed to run, by means of a trench and channel dug by the defendants above the premises. The plaintiff averred that he was "the owner, and in possession, of the premises, with the appurtenances," from which the diversion was made.

The answer consists, first, of a general denial of all the allegations of the complaint; secondly, a denial of knowledge or information sufficient to form a belief as to the ownership and possession of the plaintiff; thirdly, a denial of any deprivation or diversion of the water, as claimed by the plaintiff; and, fourthly, of an allegation that defendants, at the request of plaintiff, and with the leave, license and permission of the plaintiff, first "made, given and granted," constructed an aqueduct to convey, and by means of which they did convey, the

water, &c., to the village of Howard, "for the purpose of supplying the inhabitants of the said village with water," which is the unlawful diversion of the water of the stream or water-course, from the lands of the plaintiff, alleged in the complaint.

The provision of law applicable to this subject is as follows: "Costs shall be allowed of course to the plaintiff upon a recovery, when a claim of title to real property arises upon the pleadings." (Code, § 304, sub. 1.) Does such a question arise upon these pleadings? It will be seen that, in the complaint, there is a specific allegation of both ownership and possession of the premises, and that the answer denies every allegation of the complaint. It is quite probable that it would have been sufficient for the plaintiff to have alleged possession alone, and that proof of this would have entitled him to recover, unless the defendants had set up, on their behalf, and proved, a paramount title. But having alleged the ownership, and the defendants having distinctly taken issue upon it, it became incumbent upon the plaintiff to go down to trial prepared to establish his title to the premises. Nor is it any answer to say that the defendant may have been willing to, or in point of fact did, upon the trial, concede the ownership of the plaintiff; because, if the defendants put the title in issue, and compel the plaintiff to prepare to prove it, they cannot relieve themselves from liability to pay costs by admitting the title upon the trial. (*Niles v. Lindsley*, 1 Duer, 610.) The defendants might have relieved themselves of this liability by admitting the title, and denying the possession; but having taken the distinct issue, I am of opinion that they are estopped from denying that the plaintiff was bound to be prepared to prove his title upon the trial, and the question being thus presented by the pleadings, the plaintiff is, of course, entitled to his costs, whatever may be the amount of the recovery.

But, if mistaken in this conclusion, it seems to me quite clear that, under the fourth defence, the question of title is fairly presented. It sets forth a license to do the thing complained of, made, given and granted by the plaintiff, for the purpose of supplying the village of Howard with water. Now this is

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not a mere license to the defendants to do some act upon their own land, which may be attended with some consequential injury to the plaintiff, nor to do some act upon the land of the plaintiff by virtue of a license revocable at pleasure, but it is the assertion of a claim to a permanent and continuing right to take from the plaintiff a part of his real property and devote it to the purposes of the defendants by a perpetual appropriation. The right which the plaintiff claims is a corporeal hereditament appurtenant to and so connected with the enjoyment of his premises as to constitute an estate in land which can only be created or aliened by deed. The statute, which provides that no estate or interest in lands shall be created, granted or assigned, unless by act or operation of law, or by deed or conveyance, &c., declares that such estate or interest shall embrace "every estate and interest, freehold and chattel, legal and equitable, present and future, vested and contingent, in lands, tenements and hereditaments." (2 R. S., 134, § 6; 137, § 6.) The case of *Mumford v. Whitney* (15 Wend., 380), appears to establish, very clearly, the proposition that such an interest as is claimed by the defendants here, consisting of a total diversion of the water from the plaintiff's premises, and that, not for a mere temporary purpose, and to be restored when the object is accomplished for which the diversion takes place is such an interest as can only pass by a conveyance executed with the solemnities required to pass real estate. (See also, to the same effect, *Davis v. Townsend*, 10 Barb., 833.)

When the defendants, in their answer, set up that the license claimed was first made, given and granted by the plaintiff, language is used which conveys the idea of a legal grant with all the requisite formalities to convey an interest in real estate—an interest, not for a fugitive or temporary purpose, but to supply water to the population of a neighboring village for all time to come, and to the utter exclusion of the plaintiff from any right to, or usufruct of, the water thus diverted. A verdict, upon such an answer, in favor of the defendants, would probably have forever established the claim set up by the defendants; and it was, above all things, necessary for the

plaintiff to come to the trial with proof which should set his title at rest, and overthrow, if he could, a claim, not, like many found in the books, to overflow his land, or slightly or transiently divert his water-course, but to deprive him wholly, and for all time to come, of a valuable part of his inheritance. If title can, by any form of pleading, be put in issue, it would seem that this answer presents such a case.

I do not think it would be profitable to go through and examine the various cases that are to be found in the books, both upon the former and the present statutes on this subject. It may be conceded that the provision is now essentially the same that it has been since the Revised Laws of 1818, with only some slight change in the phraseology. The cases are not uniform, nor wholly consistent with each other, and I find none where the precise question which these pleadings present is passed upon. The nearest approach to an adjudication upon this point is in the case of *Powell v. Rust* (8 Barb., 567). The complaint in that case averred ownership and possession of the premises in the plaintiff. The defendant set up, in his answer, an agreement by which he claimed the right to remove certain vines and shrubbery, and averred that he entered by virtue of that agreement, and under the license and consent of the plaintiff for that purpose given. The plaintiff recovered \$5 only, and the court allowed costs to the plaintiff upon the express ground that a claim of title to real property arose upon the pleadings. The court, in that case, say that whatever grows upon and is annexed to the freehold is real estate, and the question of the right of property in the shrubs, &c., growing on the plaintiff's land is a question of title under the act.

The case before us seems to be a much stronger one, and to involve a right of a much higher nature—a right, the possession and permanent retention of which can only be challenged and maintained by the defendants through a conveyance assuring to them the title and the right; and if so, the conclusion is irresistible that a claim to real property was presented by the pleadings.

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My opinion is, that the judgment of the general term should be reversed, and that of the special term affirmed.

CLERKE, J., also dissented.

Judgment affirmed.

81	474
121	430
21	474
123	114
21	474
134	400
21	474
144	324
21	474
150	148

HOLDANE v. TRUSTEES OF THE VILLAGE OF COLD SPRING.

The owner of land in a village intending a dedication to the public, opened and fenced out an avenue, from a public highway, through his premises, but communicating with no highway except at one end. It was, by his consent, designated as an avenue, upon a published map of the village, and all persons freely used to drive and walk upon it for more than two years: *Held*, that these circumstances do not establish an irrevocable dedication.

In order to preclude the owner of land from revoking a dedication of a highway, however decisively his intention to dedicate be manifested, there must be an acceptance, either by formal act of the public authorities, or by common use under circumstances showing a clear intent to accept and enjoy the easement for the specific purpose of the proposed dedication.

Aliter as against individuals who have acquired private rights with reference to such dedication.

Whether an avenue communicating with a highway only at one end, is a highway, or capable of being made such by dedication or otherwise, *Quere*.

APPEAL from the Supreme Court. Action to restrain the Trustees of Cold Spring from removing a fence, gateposts and columns, erected by the plaintiff, across the intersection of Northern avenue, and a contemplated extension through the plaintiff's land of Morris avenue, and from exercising any control or authority over such contemplated extension as a public street or highway. The defendants claimed that the grantors of the plaintiff had dedicated the land for an extension of Morris avenue. The trial was before a referee, who found these facts: In 1850 the heirs of Mary Gouverneur, from whom the plaintiff derived his title, caused to be opened and

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fenced a strip of land running through the lands sold by them to the plaintiff, being a prolongation of Morris avenue, from its intersection with Northern avenue to the south boundary of the land of George P. Morris—which is also the north line of the village of Cold Spring—with the intention of dedicating the same to the use of the public, as a highway. This strip of land was mapped and designated as a highway by the consent and direction of the owners, or their agent, upon a map of the village of Cold Spring, made and published by one John Bevan. The strip of land so opened and fenced, was used by the public, from that time, by walking and driving upon the same, and by going up to the inclosure of George P. Morris, and returning over and by the same, until it was closed by the plaintiff in 1853. Morris avenue, of which the strip thus fenced and used was a prolongation, and Northern avenue, which it intersected, were public highways, but it terminated at its other end without reaching any public highway or road.

The referee held that a street communicating with a public road, only at one end, and closed at the other, a *cul de sac*, cannot be dedicated as a highway. Upon this ground he ordered judgment for the plaintiff. This judgment was affirmed at general term in the second district; two of the judges going upon the ground stated by the referee, the other two going upon the ground that there had been no acceptance of the intended dedication by the public authorities. The defendants appealed to this court.

John H. Reynolds, for the appellants.

Ira Harris, for the respondent.

WRIGHT, J. Apprehending that the defendants, in accordance with a resolution adopted by them as a board of trustees, would proceed to tear down and remove the fence and gateposts, erected by the plaintiff across the south end of the strip of land called, in the Case, the continuation or prolongation of Morris avenue, from Northern avenue to the south boundary

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of the inclosure of George P. Morris, this action was brought. No question was raised on the trial as to the right of the plaintiff to be relieved in a court of equity, provided there had been no effectual and binding dedication of the strip to the use of the public as a highway, and the trustees could not legally interfere in exercising authority over the streets and roads of the village. The referee omitted to find the fact whether there had been a dedication of the easement to the public, or not, but found facts tending to show a design or intention, by the owners of the land, before they sold it to the plaintiff, to dedicate the strip to the use of the public as a street or avenue, and that the public, to some extent, had used it. He assumed the intention to dedicate, and acceptance by the public, to have been sufficiently shown to preclude the plaintiff from asserting any right inconsistent with the public use, provided it could become a highway; but proceeded to determine the action in favor of the plaintiff, on the single ground that the strip of land in question was a mere *cul de sac*, that could not be made a highway entitling the public to the right of free and indiscriminate passage. So, that though the former owners may have intended to make a dedication to the public of the strip opened and fenced, for a highway, it did not become such, and the owner could resume the possession.

It is incumbent on the defendants before they can exert any authority over, or interfere with, the plaintiff's land, to establish the fact that the public have acquired some interest or easement in, or right to use and occupy it. This right may be acquired by grant, prescription or actual dedication, made by the owner of the land and accepted by the public. In this case no right is claimed by grant or prescription, but the allegation is, that there was an actual dedication, irrevocable in its nature and character, by the former owners, precluding the plaintiff from reclaiming the land, and devoting the same, for all time, to the public servitude. If this be so, there may be ground for the defendants' interference; but unless the facts make out a case of actual dedication, under circumstances concluding the owner from any subsequent resumption of his land, they must fail.

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The question, then, primarily arises, as to what was done by the owner and the public to dedicate and devote the land of the former to the public use as a highway? All that the owners of the land appear to have done was to open and fence the strip, some two years before the plaintiff assumed to close it, with the intention, as the referee has found, of dedicating the same to the use of the public; and by themselves, or their agent in charge of the property, to consent and direct that it be mapped and designated as a highway upon a map of the village made and published by one John Bevan. Who this surveyor and mappist was, is not shown in the case. The proposed avenue did not cross or extend to any highway or street, but entering the plaintiff's land on the south from Northern avenue, terminated on his land, or at the division line between the plaintiff and the inclosure of George P. Morris. Whilst open, the referee has found that "it was used by the public by walking and driving upon the same, and by going up to the inclosure of George P. Morris, and returning over and by the same." It is apparent that it was not susceptible of use as a thoroughfare, but all the common use to which it could have been devoted, was to walk or drive to and from the inclosure of Morris. These are all the facts and circumstances bearing on the question of actual dedication, and they appear to me to fall short of entitling the public to assert an irrevocable right of way over the land. The acts of the owner, and the public, are too equivocal and indecisive, to fix a perpetual public burden upon the property of such owner. Undoubtedly the owner of land may dedicate, or set apart a street or highway through it to the public use, and if the dedication be accepted, it will work an estoppel *in pais*, precluding the owner from asserting any right inconsistent with such use. The dedication and acceptance are to be proved or disproved by the acts of the owner, and the circumstances under which the land has been used. Both are questions of intention. The owner's acts and declarations should be deliberate, unequivocal and decisive, manifesting a positive and unmistakable intention to permanently abandon his property to the specific public use. If they

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be equivocal, or do not clearly and plainly indicate the intention to permanently abandon the property to the use of the public, they are insufficient to establish a case of dedication. In the case of a highway, the public must accept the dedication, and before it is accepted the owner is not precluded from revoking it. It is not necessary that there should be any formal act of acceptance by the public authorities, but it may be indicated by common user, under circumstances showing a clear intent to accept and enjoy, as such, the easement proposed to be dedicated. Throwing open land in a village, and fencing it on each side; and causing the way or avenue to be designated as public on a map of the village, are acts tending strongly to show a design, presently, or at some future period, to dedicate and devote it to the public use. But these acts are not conclusive to establish a present dedication binding on the owner of the land. One may fence off a strip of his own land, for the purpose of a passage way, opening on a public street, or he may lay out a street through it, with the view of subdividing his land bounded upon it into village lots, intending, upon the sale of such lots, to dedicate the street to the use of the public, but in such cases, though the public may have occasionally, or, indeed, at all times, used the open way in passing to and from the inclosure of an adjoining proprietor, it could scarcely be pretended that the land had thereby become burdened with an irrevocable public servitude. That the Gouverneur heirs, in this case, did not intend that there should be an immediate, present dedication of the strip of land opened and fenced to the use of the public as a highway, seems plain from the nature of their acts, and the attending circumstances. It was not susceptible of use as a thoroughfare, or for any purpose, other than to pass to and from the premises of Morris, or to get on to the lands of the plaintiff. It is not claimed that the dedication was of a public walk, or, indeed, of anything but a public street or highway. The circumstances tend to show that the avenue was opened to invite purchasers of village lots, located on each side of it; the owners of the land contemplating and intending, doubtless, after disposing of lots for building pur-

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poses, to throw open such street or avenue to the public use. Such an intention is, indeed, quite as deducible from the acts of the owners, as found by the referee, and the surrounding circumstances, as that they intended to set apart their land to the use of the public to go to and from the inclosure of Morris.

Nor can I well see how the common use of this *cul de sac*, to reach the plaintiff's lands, or the inclosure of Morris, can sufficiently indicate the acceptance of the dedication of a highway. To complete the dedication of a highway, if there be no formal act of acceptance by the public authorities, the acceptance should be made out by common user, as a highway, of the land dedicated. If the way attempted to be dedicated, is not susceptible of public use or passage, and cannot become a highway, it is difficult to perceive how a mere user, by the public, can be any evidence of acceptance. The presumption would rather be that the use of the *cul de sac* was by the license and permission of the owner, and not under claim of right.

The referee did not find the fact of dedication; and the facts that are specifically found do not, in my judgment, show that the public acquired a right to the use of the land, as a street or highway, by dedication of the former or present owner. Assuming, however, that enough was done by the owners to constitute a present dedication of the land, I think they still had a right to revoke it. The law of dedication is somewhat anomalous; but it may be said to rest, in part at least, upon the doctrine of estoppel *in pais*. Though the owner of land in a city or village may evince, by his acts, an intention to dedicate a street, or square, or other plat of ground, to the public use, no sufficient or valid reason can be assigned against a change of purpose and a subsequent resumption of the possession, unless the public accommodation and private rights are to be materially affected by an interruption of the enjoyment (*Cincinnati v. White*, 6 Peters, 431; *Haynes v. Thomas*, 7 Ind. R., 38.) If, however, private rights have been acquired with reference to such dedication, and such an interest secured, with

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the assent and concurrence of the owner, as would render it fraudulent in him to resume his rights, the dedication becomes irrevocable. As in the present case, if the owner of the land had opened the way in question, with the intention to dedicate it to public use as a street, and building lots had been sold and built upon, bounded on it, with the understanding on the part of the purchasers that the land was permanently devoted to public use; or, perhaps, if the public accommodation were to be seriously impaired or affected by an interruption of the use or enjoyment of the subject of the dedication, the owner would be precluded from reclaiming his land. But where nothing has been done but to open a street or way upon the owner's land, connecting with a public street of a village and terminating upon such land, and no private rights have been acquired, and the circumstances do not manifest a clear and decided purpose of permanently abandoning the property to the public use, though the public may have enjoyed free and indiscriminate passage over it, to and from the premises of an adjoining proprietor, such land is not thereby charged with a perpetual public burden. On no legal principle, or any rule of reason or conscience, has he lost his right of revocation.

I am of the opinion, therefore, that the case showed no complete and irrevocable dedication of the strip running through the plaintiff's lands to the public use as a street or highway, or for any other purpose authorizing the defendants to interpose as a municipal corporation, or in their character of commissioners of highways. Entertaining this view, I have not thought it necessary to examine particularly the ground on which the affirmance of the Supreme Court was based. I may remark, however, that if such a way as the one in question could not be made a highway by the action of the public authorities and it is essential to a public right or a public use of a way that it should be a thoroughfare, it is clear to my mind that it could not become a highway by dedication. I do not think that it could be made a highway by the legal action of the public authorities under our statutes, and I have always supposed that there could not be a public highway which termi-

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nates upon a private close and is not a thoroughfare. This being so, the purpose of the owners of the strip of land, in making the dedication (conceding it to have been made), failed. The referee finds that it was opened and fenced with the intention of dedicating the same to the use of the public as a highway. This could not be done. The intention of the party making the gift could not be legally effectuated. It did not become a highway, and the owner could rightfully resume the possession.

The judgment of the Supreme Court should be affirmed.

All the judges concurred; SELDEN, J., with a protest against any implication that a dedication can take effect without some public body to take, or without an acceptance to be proved by user or otherwise.

Judgment affirmed.

SWEZEY, Survivor, &c., v. LOTT, late Sheriff of Kings County.

A sheriff having levied an execution upon sufficient property, which is taken from his possession under a replevin in which he obtains judgment, it is his duty to prosecute the sureties in the undertaking of the plaintiff in replevin.

The sheriff is not entitled to indemnity from the plaintiff in the execution, as a condition of his prosecuting the undertaking.

In an action against the sheriff for not returning the execution, no excuse for his not prosecuting the undertaking in replevin being shown, except the absence of an indemnity for costs, the sheriff is liable for the amount of the debt, and cannot sustain a counterclaim for expenses in the replevin suit, though within the terms of the bond to indemnify him.

APPEAL from the Supreme Court. The action was commenced in the City Court of Brooklyn against the late sheriff of Kings county, for not returning an execution which had been issued to him on a judgment for \$161.23, in favor of the plaintiff against one Jenkins. The defendant levied upon suf-

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ficient property to satisfy the execution, but it was claimed by Mary Turner under an alleged sale to her by Jenkins, the judgment debtor. Upon this, the plaintiff executed to the defendant a bond of indemnity, in the penalty of \$500, conditioned to indemnify and save him harmless from all actions, costs, damages, expenses, &c., in consequence of levying upon and selling the property. Mrs. Turner brought an action against the defendant, in the nature of replevin, and procured the property to be delivered to her; she executing to the coroner an undertaking with sureties, as required by the Code. The defendant excepted to the sureties, upon which others were added, who justified. The suit of Mary Turner resulted in a verdict and judgment for the defendant. The jury assessed the value of the property at \$500, and the defendant's costs were adjusted at \$136.32. The judgment was for a return of the property and for the costs. The plaintiff's attorney in the original judgment had notice of the replevin suit, and repeatedly consulted with the attorney employed by the defendant in that suit, and advised with him as to excepting to the sureties and as to the evidence to be given on the trial. The defendant issued an execution against Mary Turner in the replevin suit, which was returned by the coroner to the effect that he could not find the property adjudged to be returned, and that Mary Turner had not any goods, &c., whereof he could make the moneys, &c. The judgment was perfected October 27, 1854, and the return to the execution was filed on the 20th December thereafter. The present suit was commenced in February, 1856. It did not appear that any action had been commenced on the undertaking. The defendant's counsel desired to have the jury instructed, that the suit of Mary Turner was a sufficient excuse for not returning the execution, and that the defendant was under no obligation to prosecute the undertaking, and that the bond of indemnity rendered the parties to it liable to the defendant for the costs and expenses of the replevin suit, and these he sought to recover by way of counterclaim—that claim having been set up in the answer. The City Court declined to give these instructions, but, on the

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contrary, charged the jury that, as the defendant had levied on sufficient property to satisfy the execution, it was for him to show a sufficient excuse for not having returned it; that the return of the execution against Mary Turner unsatisfied did not, of itself, furnish such an excuse, inasmuch as the defendant had failed to show what, if anything, he had done towards enforcing the undertaking which was an equivalent for the property levied on. The defendant's counsel excepted to the refusal to charge, and to the charge as given. Verdict for the plaintiff, for the amount of the unpaid judgment, with interest. Upon an appeal to the Supreme Court, the judgment of the City Court was reversed, and a new trial awarded. The plaintiff appealed here, giving the stipulation required by the Code.

W. B. Ackley, for the appellant.

James M. Campbell, for the respondent.

DENIO, J. The Supreme Court was of opinion that, as the bond of indemnity which the plaintiff had given to the defendant, as sheriff did not extend to an action on the undertaking, and would not have afforded an indemnity against costs in such an action, the defendant was justified in omitting to do anything further after the return of the execution against Mary Turner unsatisfied. In this, I think, the court fell into an error. The bond was given in consequence of the claim of Mary Turner that the property levied on belonged to her. By executing the bond, the plaintiffs assumed the whole risk which the sheriff would incur in consequence of that claim, and the defendant then proceeded to execute the *fi. fa.* The result of the replevin suit showed conclusively that her claim was unfounded, and that the property really belonged to the judgment debtor. The undertaking given by the plaintiff in the replevin had then become the equivalent for the property; and though, in form, it ran to the coroner, the defendant was entitled to maintain an action upon it, and could claim to have it assigned to him.

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(2 R. S., 598, § 64; *Acker v. Finn*, 5 Hill, 299.) I do not find any provision of law which would entitle the plaintiffs, who had no property, general or special, in the goods, to an assignment of the undertaking. By an arrangement between them and the defendant, they might, no doubt, have taken upon themselves the burden of prosecuting the undertaking, and it would not have been unreasonable in them to have done so. But, in point of law, the further duty of pursuing the remedy on the undertaking belonged to the defendant, as sheriff, and this duty he neglected for more than a year after the return of the execution against Mary Turner. There is nothing in the case to show that the sureties were not abundantly responsible, or that the money could not have been collected, if the defendant had enforced the undertaking.

It seems that, at common law, an action on the case would not lie against a sheriff for an omission of duty in the execution of process of this kind; but the statute has given an action to the creditor against him for not returning the execution, and the settled doctrine of the courts is, that where it has not been returned, he is, *prima facie*, liable for the debt, but may mitigate the damages by showing that the defendant had no property of which the judgment could be levied. Where, as in this case, there was sufficient property, and he has not made the money nor returned the execution, nor shown any sufficient reason why he has not done so, he is chargeable with the debt. (*Bank of Rome v. Curtis*, 1 Hill, 275; *Pardee v. Robertson*, 6 Id., 350; *Ledyard v. Jones*, 4 Sandf. S. C. R., 67; S. C., 8 Seld., 550.) It has been urged that it might happen that an action by the defendant against the sureties would be fruitless, as they may have become insolvent, or may have justified fraudulently, and that the sheriff might thereby incur the expense of an action for which he would have no indemnity. This might, no doubt, so turn out; but it is one of the burdens of the office which the defendant assumed, and for which he can only be compensated by the other advantages which the office confers. The duty of prosecuting the undertaking to judgment and execution was as obligatory as the levying upon

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the defendant's property in the first instance. Upon the proof in this case there was nothing to raise a doubt as to the result of such a prosecution, nor any reason for calling upon the plaintiffs to furnish an indemnity against any possible loss which might be sustained.

There was no ground upon which the counterclaim could be allowed. Upon the comprehensive terms of the bond, it is true that the obligors might be liable for the expenses of the suit, though the judgment was against Mrs. Turner; but until the remedy on the undertaking shall be shown to be fruitless, it cannot be said that the defendant has suffered any loss or damage in consequence of her claim to the property or her action for its recovery.

I am in favor of reversing the judgment of the Supreme Court, and affirming that of the City Court.

All the judges concurring,

Judgment accordingly.

THE FARMERS' BANK OF BRIDGEPORT v. VAIL.

The indorser of a promissory note dishonored on Saturday is duly charged where the agent for its collection, not being able to ascertain the indorser's residence, mails notice of its non-payment, on the following Monday, to his principal; and the principal, on the next day after receiving it, mails notice to the indorser.

It is immaterial whether or not the holder of the note appears upon it as indorser.

APPEAL from the Supreme Court. Action by indorsee against indorser on a promissory note. It was dated New York, October 24, 1854, and was for \$1,800, payable at the Broadway Bank, at three months, to the order of the defendant. The only question was, whether the defendant had been regularly charged as indorser. The note matured January 27,

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1855, which was Saturday. On that day the Broadway Bank, to which, as it is to be inferred from the evidence, it had been forwarded for collection, placed it in the hands of a notary, who caused it to be presented for payment, and, payment being refused, the notary, on the succeeding Monday, put two notices of protest in the New York post-office, one addressed to the defendant, inclosed in an envelope to the plaintiff at Bridgeport, and the other to the defendant in New York. There was nothing on the note to show where the defendant resided; and the notary did not know his residence. Before mailing the notices, he made inquiries as to such residence, but was unable to ascertain it. He, in fact, resided near Sing Sing, and his place of business was in that village, and he was president of a bank there. On Tuesday, January 30, the plaintiff inclosed the notice of protest which the notary had sent him, and placed it in the post-office at Bridgeport, properly directed, and the defendant received it immediately afterwards. It did not appear whether the plaintiff indorsed the note. The referee before whom the cause was tried held that notice of protest was properly given, and the plaintiff had judgment, which having been affirmed at general term in the first district, the defendant appealed to this court. The case was submitted on printed points.

M. L. Cobb, for the appellant.

Lyon & Porter, for the respondent.

WRIGHT, J. There is but a single question attempted to be raised in the case, viz.: whether reasonable diligence was used in notifying the defendant of the non-payment of the note. I have intentionally used the expression, *attempted* to be raised, for it is to be doubted, as the case and exceptions are presented, whether the question of diligence can or should be considered. The question is one of law, when there is no dispute as to the facts. There was no dispute in this case, but instead of presenting the question to the referee, on a motion for a

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nonsuit, or in some other way, it seems not to have been distinctly or definitely raised. After evidence had been given by the plaintiffs, tending to show a demand, protest and notice of non-payment, the note was offered in evidence, the defendant objecting on the ground that the proper proof of demand and notice of protest had not been made. The referee did not then pass upon the objection, but subsequently, and after evidence had been given as to demand and protest, the note and certificate of protest was received in evidence, the defendant's counsel only interposing a general objection. There was no objection that the note ought not to be read in evidence, on the ground of want of diligence in giving notice of dishonor to the indorser, nor was the referee requested, in any stage of the trial, to pass upon that question as one of law. He has decided it as one of fact against the defendant.

But if the question of diligence is open, and to be considered as one of law, I see no difficulty in sustaining the judgment of the referee. When the note fell due it was in the Broadway Bank, the place where payment was to be demanded. It is to be inferred that it was indorsed, by the plaintiffs, to the Broadway Bank for collection; the latter bank was certainly their agent for that purpose. The Broadway Bank employed their notary to demand payment and, in the event of refusal, to protest the note and give notice of its dishonor. The plaintiffs are to be regarded as a party to the paper, for all the purposes of receiving and giving notice to charge the prior parties. (Edwards on Bills, 622; *Bank of the United States v. Davis*, 2 Hill, 451; *Clode v. Bayley*, 12 Meeson & Welsb., 51.) The note was protested, after banking hours, on the 27th of January, which was Saturday. The notary had, until the next day, that is, the next *business* day, which was Monday, the 29th, to give notice of non-payment. When the third day of grace falls on Saturday, the notice of non-payment need not be given until the next Monday. (*Williams v. Matthews*, 8 Cow., 252.)

The defendant appears to me to have been regularly notified. Due diligence, within legal rules, was used.

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When an indorser intends charging previous indorsers by consecutive notices, and they reside in different places, due diligence will have been used when notice is sent the day following that on which it is received. The rule is the same though the paper is indorsed from one to another agent for collection merely. Each of such indorsers is to be regarded as a party for all the purposes of charging prior parties. In *Scott v. Lifford* (9 East., 847), the plaintiff, having become the holder of a bill of exchange, had placed it in the hands of his bankers. On the 4th June, when the bill became due, a clerk of the bankers presented it for payment, and it was dishonored. On the 5th they returned it to the plaintiff, who, by letter put into the two-penny post on the 6th, gave notice to the defendant (the drawer), of the dishonor; the plaintiff living in London, and the defendant at Shadwell. It was held that reasonable diligence had been used.

But, even if the principle of charging prior parties by consecutive notices, from one to the other, did not apply, and the plaintiffs are to be regarded as the holders of the note, and not the Broadway Bank, when it became due, and the notary, as the agent of the plaintiff, and not of the latter bank, in giving notice of the dishonor, I think there was no want of reasonable diligence. The note purported to have been made at New York, and was payable at a bank in that city. The notary was ignorant of the place of residence of the defendant, and the latter had not left any notice or memoranda with any one to indicate it. The referee finds that the notary made inquiries for the defendant's place of residence, but was not able to ascertain where it was; whereupon he deposited in the post-office, at New York, a notice directed to him at New York, and mailed another notice, directed to him under an inclosure to the cashier of the plaintiff's bank at Bridgeport. This amounted to due diligence, unless we are to assume that the plaintiffs well knew where the defendant resided when the paper was about to mature, and, in anticipation of default in payment, by the maker, on presentation, were bound to com-

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municate such knowledge to their collecting agent or the notary in New York.

I am of the opinion that the judgment of the Supreme Court should be affirmed.

DENIO, J. The case of *Howard v. Ives* (1 Hill, 268), is precisely in point against the defendant, unless the distinction insisted on by his counsel is a substantial one. In that case, the holder, residing at Troy, indorsed the paper to the Union Bank of New York for collection; while, in the present case, it was forwarded to a bank in that city under the blank indorsement of the defendant. The point of the defendant's counsel is, that the case does not apply because the plaintiff here did not indorse the note to the Broadway Bank. But I am of opinion that the difference is not material. Whether the note was forwarded under the indorsement of the plaintiff or that of the defendant, the transaction, when explained, amounts only to the creation of an agency for the purpose of collecting the note. In both cases, the indorsement-clothed the collecting agent with an apparent title to the note. The case cited establishes, first, that the holder's agent, at the place of payment, may forward the notice to his principal in the interior, and if the latter forward it seasonably to the party to be charged he will be fixed, though more time is consumed than there would have been if the agent had sent it directly to the party to whom the ultimate notice was to be given; second, that where the note matures on Saturday the notice need not be mailed until Monday; and, thirdly, that, in the case of a circuitous notice, it will be in time if the intermediate party forwards it the next day after he receives it. This covers all the questions which can arise in this case; and the consequence is, that the defendant was duly charged, and that the judgment of the Supreme Court must be affirmed.

All the judges concurring,

Judgment affirmed.

The Oneida Bank v. The Ontario Bank.

THE ONEIDA BANK v. THE ONTARIO BANK.

A draft issued by a banking association, and taking effect by delivery, but post-dated, is, *it seems*, within the prohibition of the statute (ch. 363 of 1840, § 4), against bills or notes not payable on demand.

The case of *Leavitt v. Palmer* (3 Comst., 19), so far as it holds such a draft void, if within the prohibition, questioned, *per* Comstock, Ch. J.

Assuming such draft to be void, the party who has taken it upon a loan of money to the bank is entitled to the money advanced by him, either upon the basis of the contract of loan, treating that as valid and rejecting the illegal security, or upon a disaffirmance of the contract, as for money had and received.

This right of action is transferred by a sale and indorsement of the draft, although it be held void.

The fact that the draft is transferred to a bank which, against the prohibition of the safety fund act (ch. 94 of 1829, § 33), discounts it, having less than sixty days to run, at a greater rate of interest than six per cent, is not available to the drawer as a defence against the same liability which might have been enforced by the original holder.

The restriction of the rate of interest is, it seems, designed only for the benefit of the borrower.

On a verdict subject to the opinion of the court, the question is, who is entitled to judgment upon the facts established, and when the objection has not been taken at the trial, the verdict may be supported upon any theory consistent with the facts, though not suggested by the pleadings.

APPEAL from a judgment of the Supreme Court, sitting in the fifth district, in favor of the defendant, after a verdict in the plaintiff's favor, for \$14,255, had been taken at the Oneida Circuit, subject to the opinion of the court. For the purpose of a review in this court, a statement of facts was prepared and filed with the judgment roll, according to the requirement of the Code of Practice (Code of 1858, § 333). The following principal facts appeared from that statement: The plaintiff and defendant were banks doing business in the city of Utica, the former under a special charter passed in 1836, and the latter having been organized as an association under the general banking law of 1838. James S. Lynch was the defendant's cashier, and, according to a uniform practice, drafts issued by the bank were signed by him without any other signature. As such

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cashier, he signed and delivered to one Perry four drafts, of the following dates and amounts: one, dated July 24, 1857, for \$3,000; one, dated July 30, 1857, for \$5,000; one, dated August 3, 1857, for \$3,000; one, dated August 15, 1857, for \$3,000. These drafts were all payable to Perry or his order, and they were drawn upon Messrs. Duncan, Sherman & Co., of New York, the defendant's correspondents in that city. The drafts were all post-dated, being, in fact, made and delivered to Perry about four weeks before their respective dates. They were made for the purpose of obtaining funds for the bank. Perry kept an account in the bank, and for the amount of each draft, when issued to him, he gave the bank his check upon the deposit to his credit on the books. His account on each occasion was good for the amount of his check, and each check was charged to him in that account. Perry, after receiving the drafts, indorsed and procured them to be discounted by the plaintiff; and, in discounting them, interest at the rate of seven per cent per annum was deducted from the time of each discount until the maturity, that is to say, until the date of the drafts; all of them being, on their face, payable without time. With this deduction of interest, Perry received from the plaintiff the value or amount of the drafts. The time of discounting them was immediately, or very soon, after they were delivered to Perry, and about four weeks before their respective dates. When the dates arrived, or upon the next day, they were presented to Messrs. Duncan, Sherman & Co. for payment, which was refused, and due notice of the dishonor was thereupon given to the defendant's bank as the drawer.

It also appeared, from said statement, that Perry, on receiving from the plaintiff the proceeds of the several discounts of these drafts, deposited the same in the defendant's bank, where they were credited in his account. It further appeared that the cashier, Lynch, requested Perry to draw his checks aforesaid, upon his funds in the defendant's bank, to receive therefor the said post-dated drafts, and to procure the same to be discounted. In this connection the statement proceeded as follows: "In procuring the plaintiff to discount or advance

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funds on the drafts, Perry did not represent or hold himself out to the plaintiff as the agent of the defendant, or that he was, in any way, acting on account of, or for the benefit of the defendant, but represented to the plaintiff that he was acting for himself, individually, in the matter, nor did the plaintiff deal with Perry as the agent of, or supposing him to be in any way acting for, or on behalf of the defendant. The plaintiff intended to, and did discount the drafts, and each of them, for Perry and loaned to him the funds parted with, and did not loan the same, or any part thereof, to the defendant or for its use or benefit."

The foregoing facts, and others having no material bearing upon the case, appeared from the said statement, but the statement did not contain any conclusions of law arrived at by the Supreme Court, other than a general direction for judgment in favor of the defendant. The legal propositions, however, contended for by the counsel of the respective parties, were set forth. The counsel for the defendant insisted that the drafts were illegal and void, upon grounds, which, so far as they are necessary to be stated, will appear in the following opinion. He also insisted that the plaintiff could not recover, as for money loaned and advanced, upon a theory that the case was one of direct dealing between the plaintiff and defendant. In this connection, it was claimed in the court below, as it was also in this court, that Perry was not the defendant's agent, and that the dealing of the plaintiff, in discounting the drafts, was with him, and not with the defendant. For the plaintiff, on the other hand, it was insisted that a recovery could be had on the drafts; or if not, then for the money advanced to Perry on discounting each of them. In the latter aspect the plaintiff's counsel did not, according to the statement, specify whether he claimed as for money loaned directly to the defendant, through the agency of Perry, or whether he regarded Perry as the original lender upon the drafts, and the plaintiff as having succeeded to his rights. From the case made at the trial for the judgment of the Supreme Court, it only appeared that at the close of the evidence, the defendant's

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counsel objected to a recovery, on various grounds stated, and that thereupon a verdict was directed, subject to the opinion of the court, for the plaintiff, for the amount advanced, with interest at six per cent for the time elapsing between the advance and the maturity of the drafts respectively; the plaintiff waiving the difference between that and interest at seven per cent. The particular grounds, or legal propositions, on which the plaintiff claimed to recover, were not at all mentioned in the case so made. From the judgment rendered in favor of the defendant, the plaintiff appealed to this court. The case was first argued at June term, 1859, and a reargument was ordered.

Daniel Pratt and Philo Gridley, for the appellant.

Samuel Beardsley and Francis Kernan, for the respondent.

COMSTOCK, Ch. J. The counsel for the defendant insisted, in the court below, and he has also claimed in this court, that none of the dealings in question occurred between the plaintiff and the defendant; in other words, that Perry lent the money represented by the drafts, and that the plaintiff discounted the drafts for him. In this view of the case, it is urged that the action must fail, first, because the drafts are void, and, secondly, because there was no loan or advance of money between the parties to the suit. I am of opinion that this is the correct theory of the facts of the case. We must determine the question by the statement of the Supreme Court made for the purpose of a review in this court; and we are not at liberty to look elsewhere, and form our own independent conclusions. The obvious import of that statement is, that although Perry, in those transactions, acted on the request of Lynch, the defendant's cashier, nevertheless, he was in reality the lender of the money on which the drafts were based. It seems that he kept a continuous account at the bank, which was good, on each occasion when he drew his checks, for the sums of money represented in the several drafts. For each check which, when

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charged to him, transferred so much of his funds to the bank, he received a draft. The transactions certainly had all the forms of a loan, there being, on the one side, an actual advance of money, and, on the other, the issuing of a post-dated security therefor. I think, also, that the Supreme Court, in making its record of the facts, intended to be understood as saying that these dealings were loans from Perry to the defendant, not in form merely, but according to the actual meaning of the parties. The language of the record is explicit, that the plaintiff discounted the drafts for Perry and loaned to him the funds parted with, and did not loan the same, or any part thereof, to the defendant, or for its use or benefit. Finding no room for any other interpretation of the statement, I shall assume that the drafts in question were issued by the defendant's bank in consideration of an equal amount of moneys loaned to it by Perry, and that Perry, on his own account, indorsed them to the plaintiff's bank, which discounted them for him.

Proceeding now to the questions of law which arise in the case, upon this understanding of the facts, it is claimed, on the part of the defendant, that the drafts were illegal and void, because they were issued in violation of the statute of 1840 against time-bills and notes, which declares that "no banking association or individual banker, as such, shall issue, or put in circulation, any bill or note of such association or individual banker, unless the same shall be made payable on demand, and without interest." (Stat. of 1840, p. 206, § 4.) In an opinion which I prepared upon this case, after the first argument, during the last year, I came to the conclusion, for which my reasons were stated at some length, that a post-dated draft, taking effect by delivery, was a time-draft, and was within the intent and policy of the prohibition declared by this statute. I am still of that opinion; but we do not pass upon the question, because the result of the present controversy does not depend upon the correctness or incorrectness of that conclusion.

Assuming that these drafts do fall within the prohibition of that statute, it is next contended that they are, for that reason, null and void, so that no holder, having, as the plaintiff must

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have had, notice of their true character, can maintain an action upon them. For all the purposes of the case, the soundness of this position will also be assumed, upon the direct authority of *Leavitt v. Palmer* (3 Comst., 19), decided in this court. If the question were now a new one, I should entertain the opinion, certainly with diffidence, that the decision here referred to went far beyond the intention of the legislature. After the prohibitory words of the statute above quoted, the same section proceeds to declare, that "every violation of this section, by any officer or member of a banking association, or by any individual banker, shall be deemed and adjudged a misdemeanor, punishable by fine or imprisonment, or both, in the discretion of the court having cognizance thereof." There is, no doubt, a principle of the common law, that illegal and prohibited contracts are void, without being so expressly declared by any statute. But there is also another principle, equally well ascertained, and more beneficent in its results, that no party shall set up his own illegality or wrong to the prejudice of an innocent person. He can set it up when the legislative power not only forbids to make the contract, but declares it to be void. But the logic of the law, and certainly its morality, are not opposed to the doctrine that the legislature may prohibit the contract and punish the guilty parties, and yet leave the contract to stand in favor of innocent persons not included in the terms of the prohibition. This, I think, is a just result from the decision of this court in *Tracy v. Tallmadge* (14 N. Y., 162), and of the principles which underlie that decision. In regard to the statute now in question, reading the whole of the prohibitory section, it seems to me the intention of the legislature was to forbid bankers, and officers and members of banking associations, to issue contracts of a certain description, and to punish them if they violated the law, but not to enable them to take advantage of their own wrong by repudiating their own obligations. There is no present occasion to pursue this subject further, because, in the view which we take of the questions yet to be considered, the plaintiff's rights do not necessarily depend on the validity of the drafts.

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I proceed, therefore, next to observe that a party dealing with one of these banks, and taking from it a security which the statute prohibits, can reject the security, if it be regarded as void, and recover the money or value which he advanced on receiving it. The general principles involved in this proposition, have been more than once carefully considered in this court, and I think the very point has been fully determined. (*Tracy v. Tallmadge*, 14 N. Y., 162; *Curtis v. Leawitt*, 15 *Id.*, 9; *Sacketts Harbor Bank v. Codd*, 18 *Id.*, 240.) The argument for the defendant against this position, rests wholly on the idea that Perry, in receiving the post-dated drafts, was as much a public offender as the bank or its officers issuing them. Assuming these instruments to have been issued contrary to law, and that they are void, then if we also consider that both the parties to these dealings were offenders, and equally so, the consequence would probably follow that Perry, if he were now the plaintiff, not only could not recover on the drafts, but could not maintain his suit for the money lent. But such were not the relations of both the parties to these transactions. Whatever there was of guilt in the issuing of the drafts, it was the creature of the statute. There is no rule of ethics or principle of the common law, against the issue of time obligations by banks or bankers. The offence is therefore precisely of the nature, form and proportions which the legislature have declared. By that authority, and that alone, the bank is prohibited from issuing, but not the dealer from receiving; and the punishment is denounced solely against the individual banker, or the officers, agents and members of the association. The same power which created the offence, has designated the criminal parties. This designation is made by the very terms in which the prohibition is clothed and the punishment prescribed. The statute is wholly incapable of a construction which would sustain an indictment against a customer or dealer, who should receive from a banker a post-note for his money, his property, or his services; and, yet without such a construction, there can be no pretence for saying that he is in any sense a public offender. We are of opinion that the case, in this respect, is

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undistinguishable from those referred to, and we consequently come to the conclusion that if the issuing of the draft was prohibited, and if they were also void, Perry, nevertheless, had a right to demand and recover the sums of money which he actually loaned to the defendant. The loans, themselves, were lawful contracts, and I see no reason why they cannot stand according to their terms and intention, rejecting only the assurances given for the repayment as simply worthless. This point, I think, was directly involved and determined in *Curtis v. Leavitt* (15 N. Y., 95 99). But the result in this case will be the same, whether we consider the right of Perry to sue as resting on the contract by which he agreed to lend, and the defendant to repay by a specified time, or on a total disaffirmance of the entire transaction between him and the defendant. In the latter aspect, the defendant received his money and held it, for his use, whenever he chose to demand it. (*Tracy v. Tallmadge, supra.*)

The next question, therefore, is, whether the right of action to recover the money still remains in Perry, or whether he transferred it to the plaintiff. In either case, the suit, if not maintainable on the drafts, would have to be brought in Perry's name, according to the principles of the common law; but, under our code of pleadings and practice, it must be brought in the name of the real party in interest. If, therefore, the dealing between Perry and the plaintiff had the effect to assign his claim, the plaintiff has the same right to maintain an action which Perry had before the dealing took place. The inquiry, then, is, whether the sale and indorsement of the drafts by him to the plaintiff, for a full consideration paid to him, did, or did not, have the effect to transfer all the claim against the defendant which the drafts were intended to represent. I examined this question after the first argument of the cause, although the counsel on both sides had failed to notice it; and I was of opinion that such was the effect of the indorsement and sale. The question has now been fully argued; and, upon the most careful consideration, I cannot bring my mind to entertain any serious doubt upon the proposition. If the drafts had been

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valid instruments, most clearly Perry's transfer of them would have left in him no pretence of any claim against the defendant's bank for the money loaned on which they were based. The idea that the plaintiff could sue on the drafts, and Perry for the money, is so absurd that it needs no refutation. But the intention and result are no less clear, the securities being void. I think it would be equally absurd to hold that Perry, after indorsing and selling the drafts for full value, retained to himself the right to disaffirm them, and to proceed in his own name and right to recover the consideration for which they had been issued to him. He who sells a security and receives his pay for it, necessarily sells whatever claim or right the security is understood by the parties to represent. For example, a note or a bond may be void for usury, but, being founded on some antecedent claim or contract free from that defect, there may be a just and legal right to recover the original consideration. The note or bond may be sold, and it will be void even in the hands of an innocent purchaser. But will it be pretended that the purchaser gets absolutely nothing? It is impossible to doubt that he will stand in the shoes of his vendor. If that be conceded, how can the application of the principle to this case be denied? I think the result may be reached even by the most technical rules of reasoning. If the drafts had been valid, the plaintiff, as the indorsee, could declare or complain on the money counts against the defendant as the drawer. The instruments would, of themselves, be evidence of money had and received by the drawer to the use of the indorsee. (17 Wend., 206; 16 *Id.*, 659; 2 Seld., 19; 1 Denio, 105.) Now, although they are void, because in a form prohibited by law, so that no action can be maintained upon them, they are still capable of being used as evidence. They are a written confession that the drawer has received the money or value expressed in them; and, if it be good technical law that the money is deemed to be held for the use of the indorsee of a valid draft, I can see no reason why the principle should not be applied when the draft itself, for some formal defect, turns out to be worthless.

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The question we are considering was, in effect, determined by this court in *Tracy v. Talmage*, *supra* (14 N. Y., 192). In that case, the Morris Canal and Banking Company had received, from one of these banking associations, post-notes, which were assumed to be void under the restraining laws, or some other statute of this State. The Morris Company then entered into a written agreement with the State of Indiana to transfer to that State those notes, to the amount of \$196,000, and the transfer was made accordingly. The consideration on which the notes had been issued was certain State stocks which the Morris Company had sold to the banking association; and one of the questions in the case was, whether Indiana was entitled to recover that consideration, the notes being considered void. There was no pretence that, in point of form, anything except the notes had been transferred to the State; yet it was held by this court, and no doubt on the subject was then entertained, that the State became in equity the assignee of the demand which the notes professed to represent, and, therefore, was entitled to recover the value of the stocks. By way of answer to that authority, and to the principle of equity which it suggests, it has been said, that the proceeding there was strictly in equity, while this is a mere action at law. The reply to this is plain. Remedies are not now embarrassed by any such distinction. Those who have read the Code of Procedure need not be informed that the old distinctions between suits at law and in equity are abolished, and that the action must now be brought in the name of the party who has the equitable right to the money or thing in controversy. If, therefore, it can be said that the assignment or sale to the plaintiff of Perry's demand against the defendant for money lent, or had and received, was defective in respect to the mere forms of transacting the business, it is, nevertheless, the duty of the courts to carry the intention into effect. That which ought to have been done, and which a court of equity would compel to be done, must, upon well settled principles, be regarded as actually done, where the ends of justice require it.

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We conclude, therefore, that the plaintiff became the assignee of the right, which it has been shown Perry had, to demand and recover from the defendant the sums loaned by him, unless the objection next to be considered stands in the way of that conclusion. The drafts were payable in less than sixty-three days from the time when the plaintiff discounted them, that is to say, they were dated some thirty days forward of that time, and they were payable when the day of their respective dates should arrive. The plaintiff, in discounting them, deducted interest at the rate of seven per cent per annum. The plaintiff is a banking corporation, subject to the provisions of the so-called "Safety Fund Act" (Laws of 1829, ch. 94), the 33d section of which declares that, "on all bills or notes discounted or received in the ordinary course of business, which shall become mature in sixty-three days from the time of such discount, the said moneyed corporations shall not take or receive more than at and after the rate of six per cent per annum in advance." This statute would seem to have been violated by the plaintiff in the discount of these drafts.

But we do not see, in this feature of the case, any valid objection which the defendant can take; and as this point was scarcely insisted upon at the argument, in the view of the case which we have so far taken, but little will need to be said in regard to it. In a case where this statute is violated, and the transaction is directly between the offending bank and the maker of an obligation so discounted, a question of some difficulty might arise whether the contract can be enforced. If, however, it be conceded that, in such a case, the debtor can resist an action, whether upon the contract, or in disaffirmance of the contract for the money advanced to him, it by no means follows that any defence of this nature exists in the controversy now before us. When, as in this case, the debt has been created and the security given between other parties, the debtor is not aggrieved, nor is his obligation in the slightest degree impaired, by a subsequent discount of the security by a bank in violation of the statute. The demand being originally a legal and valid one, it loses no quality when the holder makes

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an illegal transfer of it to a bank or to any other party. The debtor being bound to pay it to some one, all that he can claim is protection against liability to pay more than once. Being himself a stranger to the transfer, he has no right to bring forward questions and controversies which might arise between other parties, but in which he has no sort of concern. Thus, if the holder of a valid obligation should pledge or transfer it upon a usurious loan, the debtor could not impeach the title of the transferee in a suit by the latter to enforce it, where it did not appear that the pledge was in any manner disavowed or revoked by the party who made it, and who alone was aggrieved by the usury. (*Dix v. Van Wyck*, 2 Hill, 525; *Reading v. Weston*, 7 Conn., 409; *De Wolf v. Johnson*, 10 Wheat., 388.) In reference to the statute under consideration, it is a restriction upon banks, designed for the protection and benefit of those who borrow money or receive discounts from them. The defendants are not in that relation to the plaintiff. They became indebted to Perry, and they still owe that debt. They certainly have nothing to do with the rate of discount at which he sold the demand to the plaintiff. Perry has not complained, and they have no right to complain.

According to the principles we have laid down, the plaintiff is entitled to recover as the assignee and owner of the demand which Perry had for the moneys advanced by him to the defendant. Viewing the case in this light, the next position of the defendant's counsel is, that no such cause of action was set forth in the complaint, or litigated at the trial, or considered by the Supreme Court. These objections will now be examined. The complaint is upon the drafts, and also for money lent and advanced by the plaintiff to the defendant. In setting forth the cause of action on the drafts, they are averred to have been made on the days when they appear to bear date, and to have been then indorsed and negotiated by Perry to the plaintiff. These averments are followed by the usual statement of the presentment of the drafts, their non-payment, and notice thereof. The answer specifically denies the allegations of the complaint. It then proceeds to aver that Lynch, the cashier,

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made the drafts mentioned in the complaint, without authority from the defendant, and without any consideration received by the defendant. In this connection, it is denied, in substance, that the plaintiff is a *bona fide* holder. For a still further defence, it is stated that the defendant is a banking corporation; that Lynch, the cashier, confederated with Perry to violate the laws against the issue of time bills and notes; that, with this intent, the drafts in the complaint set forth were made before their respective dates, and delivered to Perry without any consideration received from him, and that Perry indorsed them to the plaintiff; and that the plaintiff, in furtherance of the same illegal design, advanced the money upon them, receiving in advance the interest which would accrue before the times when they severally bear date. In respect to the cause of action for money loaned, it is answered, that those moneys were loaned and advanced on the drafts and not otherwise, and that the drafts were made and put in circulation with the illegal intent before specified, and the plaintiff, knowing they were so made and issued, advanced the money in furtherance of the design.

It is true that the complaint does not, in terms, say that Perry lent or advanced money, but it does set forth the issuing and delivery to him of certain drafts. That fact being taken to be true as stated, it is a legal presumption that the consideration was money. It would not affect the remedy if, in point of fact, there was some other sufficient consideration. For remedial purposes, the presumption is conclusive. (2 Seld., 19; 16 Wend., 659; 1 Denio, 107.) It is also true, that the complaint has no averment that the plaintiff became the assignee of the consideration on which the drafts were based; but it does state that the plaintiff became the indorsee and holder; and we have shown, in the preceding discussion, that the indorsement and sale of the drafts was, in effect, an assignment of whatever debt or demand they were intended to be the evidence of. Undoubtedly, it would have been a more precise description of the actual case if the averments had been, that Perry lent money to the defendant and received therefor certain post-dated drafts which were worthless and void; that he

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afterwards sold and indorsed the drafts to the plaintiff for full value, and thereby made an assignment of the consideration on which they were founded. The pleader doubtless preferred not to concede the invalidity of the instruments, and therefore he made a more general statement of the case. His theory of the law may have been quite different from ours; but, in all fundamental respects, the facts of the case were truly averred. It is impossible to say that the cause of action alleged was "unproved in its entire scope and meaning." (Code, § 171.) At the trial, it appeared that the drafts were post-dated, and, therefore (so we have assumed), they were void. But the averments that they were made, and that the original holder indorsed them to the plaintiff for value, were proved to be true as alleged, and these are the essential facts which constitute the claim in controversy, by whatever name we call it. Again, the answer discloses the post-dated character of the instruments, and the sale of them to the plaintiff; and these averments being true, the plaintiff's title to recover the consideration cannot be denied. It appears to me, therefore, that there was no such defect in the pleadings as prevented an examination of the transactions in question in all their aspects, or the rendition of a judgment on the whole merits of the controversy.

But if it be conceded that our theory of the case might have been resisted at the trial on the ground that the pleadings did not present it, then the further difficulty to be now overcome is, that no such position was taken. On the contrary, it appears that no question whatever was raised upon the sufficiency or insufficiency of the complaint to cover the whole ground of the litigation. At the close of the evidence it was conceded that there was no question of fact, and a verdict was taken for the plaintiff, subject to the opinion of the court on a case. Such was the course of the trial, and the meaning of it was, that the Supreme Court were to give judgment on the verdict, or else for the defendant, as the law should require upon the facts as proved. By this course, which was taken by consent, questions of mere form and variance were waived, and the Supreme Court were asked to declare the law, as they should adjudge it

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to be, upon a statement of the controversy to be made for their consideration. If, upon that statement, the plaintiff was entitled to a judgment on the verdict, it could not rightfully be refused, on the ground that the complaint in the case did not allege all the facts necessary to such a judgment; and there is nothing to show that the decision was given upon any such ground.

It may well be true, as we were told on the argument, that the plaintiff's counsel, both at the trial and in the Supreme Court, failed to urge the particular reasons which, we think, entitled the plaintiff to recover. There is nothing in the record to show that such was the fact, and there is no law or rule of practice which required the points on either side to be stated. Nor is it material whether the case was well presented to the court below, in the arguments addressed to it. It was the duty of the judges to ascertain and declare the whole law upon the undisputed facts spread before them; and it is our duty now to give such a judgment as they ought to have given. The amount due to the plaintiff, according to the principles of this opinion, was correctly ascertained by the verdict of the jury; and we think that, upon the facts proved and contained in the statement returned upon this appeal, judgment should have been given accordingly.

The judgment appealed from must, therefore, be reversed, and final judgment for the plaintiff, according to the verdict, must be rendered.

DENIO, J., dissented; *all the other judges concurring,

Judgment accordingly.

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Where the owner of land has, by any artificial arrangement, effected an advantage for one portion, to the burdening of the other, upon a severance of the ownership the holders of the two portions take them respectively charged with the servitude and entitled to the benefit openly and visibly attached at the time of the conveyance of the portion first granted.

Accordingly, where the owner of land across which a stream flows has diverted it through an artificial channel so as to relieve a portion of it formerly overflowed, which he then conveys, neither he nor his grantees of the residue can return the stream to its ancient bed to the damage of the first grantee.

Such benefits, not naturally attached to the premises purchased, but previously conferred upon it at the expense of the other land of the grantor, do not depend upon covenant, but remain attached to the tenement conveyed, unless the right to subvert them is expressly reserved.

The rule, which is general in its application to easements which are continuous, *i. e.*, self-perpetuating, independently of human intervention, as the flow of a stream, is, it seems, restricted in the case of discontinuous easements to such as are absolutely necessary to the enjoyment of the property conveyed.

APPEAL from the Supreme Court. Action for changing the course of a stream, and flooding the plaintiff's land. Upon the trial, at the Otsego Circuit, before Mr. Justice CRIPPEN, a jury having been waived, these facts appeared: On the 27th March, 1850, Ovid Chesebro owned forty acres of land on Elk creek, through which there was a small brook running. In its natural course it would have run over half an acre of low ground, which Chesebro on that day conveyed to the plaintiff for a building lot, and upon which the plaintiff immediately thereafter erected a house and barn. Some ten years previously, the owner of the forty acres had diverted the stream through an artificial channel, carrying it into Elk creek in such a manner as not to flow over the plaintiff's land. On the 1st of April, 1850, Chesebro conveyed the residue of the forty acres to the grantor of the defendant. In 1854 the defendant dammed up

21	505
121	398
21	505
132	435
21	505
134	387
21	505
151	398
21	505
154	298
21	505
157	608
21	505
d164	433
21	505
f168	1582
21	505
169	1280

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the entrance to the artificial channel, so as to cause the stream to run in its original bed and to overflow the plaintiff's yard, which was the injury complained of. The judge ordered judgment for the defendant, which having been affirmed at general term in the sixth district, the plaintiff appealed to this court. The cause was submitted on printed arguments.

E. E. Ferry, for the appellant.

B. J. Scofield, for the respondent.

SELDEN, J. Although this is an action of a very trivial nature, in respect to the amount which it involves, it nevertheless embraces principles of very considerable importance, and should, therefore, be carefully considered. It was clearly established upon the trial that, at the time when the plaintiff purchased and took a conveyance from Chesebro, the stream in question, instead of running in its original channel, through the entire length and across the south line of the plaintiff's lot, had been turned through an artificial channel across the north line on to the other portions of the forty acres, and thence into Elk creek; thus leaving the whole of the southern portion of the plaintiff's lot, upon which he subsequently built his house and barn, dry and free from the incumbrance of the stream, which had originally spread over a considerable portion of the lot. It did not distinctly appear how long the stream had run in this artificial channel prior to the conveyance of the lot by Chesebro, nor do I deem this of any importance. It was several months, at least. The question is, whether, after conveying this lot and its appurtenances to the plaintiff, with the stream then running in the artificial channel on to adjoining premises of his own, either he or his grantees would have a right afterwards to obstruct this channel, and turn the water back through its original course across the entire lot.

The owner of real estate has, during his ownership, entire dominion and control over its various natural qualities, and may dispose of and arrange them at will. He may alter the

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natural distribution of those qualities, so as essentially to change the relative value of the different parts; and may, in a great variety of ways, make one portion of the premises subservient to another. The precise question in this case is, whether an owner, who, by such an artificial arrangement of the material properties of his estate, has added to the advantages and enhanced the value of one portion, can, after selling that portion with those advantages openly and visibly attached, voluntarily break up the arrangement, and thus destroy or materially diminish the value of the portion sold.

The rule of the common law on this subject is well settled. The principle is, that where the owner of two tenements sells one of them, or the owner of an entire estate sells a portion, the purchaser takes the tenement, or portion sold, with all the benefits and burdens which appear, at the time of the sale, to belong to it, as between it and the property which the vendor retains. This is one of the recognized modes by which an easement or servitude is created. No easement exists so long as there is a unity of ownership, because the owner of the whole may, at any time, rearrange the qualities of the several parts. But the moment a severance occurs, by the sale of a part, the right of the owner to redistribute the properties of the respective portions ceases; and easements or servitudes are created, corresponding to the benefits and burdens mutually existing at the time of the sale. This is not a rule for the benefit of purchasers only, but is entirely reciprocal. Hence, if, instead of a benefit conferred, a burden has been imposed upon the portion sold, the purchaser, provided the marks of this burden are open and visible, takes the property with the servitude upon it. The parties are presumed to contract in reference to the condition of the property at the time of the sale, and neither has a right, by altering arrangements then openly existing, to change materially the relative value of the respective parts.

These principles are so obviously just, that we might be warranted in applying them to the present case for that reason alone. But they are also sustained by ample authority. The

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oldest case on the subject appears to be that of *Coppy*, 11 Henry VII, 25, cited from the Year Books by Gale and Whately, in their work on Easements, page 41. That was an action on the case for stopping a gutter running from the building of the plaintiff over the adjoining building of the defendant. The plea was, that, within the time of memory, both buildings had belonged to the same individual, who had sold one of them to the plaintiff and the other to the defendant; and that the easement, if it ever existed, was extinguished by this unity of ownership. But the court held this to be no defence. It was, however, conceded that if the owner of both tenements, before selling either, had destroyed the gutter, and then sold, the gutter could not have been restored. This case was identical in principle with the present, and fully sustains what has been here said. It shows that, if the owner of an entire property wishes to put an end to a burden, which has been imposed upon one portion for the benefit of another, he must do so before he sells the portion benefited.

But the leading case, and the one which has always been regarded as settling the law upon this subject, is, *Nicholas v. Chamberlain* (Cro. Jac., 121), in which, to use the language of Croke, "It was held by all the court, upon demurrer, that, if one erect a house, and build a conduit thereto, in another part of his land, and convey water by pipes to the house, and afterwards sell the house with the appurtenances, excepting the land, or sell the land to another, reserving to himself the house, the conduit and pipes pass with the house, because it is necessary and *quasi* appendant thereto; and he shall have liberty by law to dig in the land for amending the pipes, or making them new, as the case may require." The authority of this case has never been shaken, but, on the contrary, it has been referred to with approbation, in all the subsequent cases in which this question has been involved.

The same doctrine was laid down in the case of *Robbins v. Barnes* (Hob., 181). It was there held, that when one of two adjoining houses was originally built in such a manner that one overhung a portion of the other, although this overhang-

ing was originally wrongful, yet if both houses should come afterwards to be owned by one individual, and he should sell them to different persons without alteration, the purchaser of the overhanging house would thereby acquire a right to maintain his house in that condition, and when it decayed to pull it down and build another of the same description. But the court at the same time held, that although the overhanging was at first rightful, yet if one, owning both houses at the same time, had removed the overhanging portion, and then sold to different persons, the overhanging could never be renewed; because the houses, as the court say, "must be taken as they were at the time of the conveyance." The whole principle is contained in the few words here quoted.

There are several American cases holding the same doctrine. The first to which I shall refer is that of *New Ipswich Factory v. Batchelder* (3 N. H., 190). A tract of land had been conveyed by metes and bounds, having upon it a mill; and, at the time of the conveyance, there was a raceway to conduct the water from the mill, running along the side of the natural stream beyond the bounds of the land granted into other lands of the grantor, and then discharging the water into the natural stream. The court held, that a right to have the water flow off uninterruptedly, through the whole extent of the raceway, passed as appurtenant to the mill. It has been suggested that the decision in this case was produced by the peculiar phraseology of the deed, which mentioned "water privileges and all other privileges annexed to or belonging to said premises;" but no stress is laid upon this language by the court in deciding the case. On the contrary, it is put expressly upon the principle of the case of *Nicholas v. Chamberlain*. The Chief Justice quotes that case at length, and then says: "The rule here laid down seems to be founded in sound reason and good sense, and to apply, in all its force, to the case now before us."

Another case, equally in point, is that of *United States v. Appleton* (1 Sumner, 492). A block of buildings was erected in Boston, in 1808, consisting of a central building and two wings, with a piazza in front of the central building, and side

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doors in the wings, which opened on and swung over the piazza, the upper parts of which were used as windows. The wings were conveyed in 1811 to different parties, without mentioning the side doors, and in 1816 the central building was sold to the United States. It was held that the use of the side doors and windows passed as appurtenances, without any reference to the length of time during which they had been used. In this case, also, the case of *Nicholas v. Chamberlain* (*supra*) was referred to and relied upon by Judge STORY. The same judge has also fully recognized the doctrine, in the previous case of *Hazard v. Robinson* (8 Mason, 272).

I shall not cite that large class of cases in which various privileges and easements have been held to pass as appurtenances, where the conveyance uses some comprehensive word, such as manor, messuage, farm, mill, and the like, as descriptive of the whole subject of the grant, because those cases are explained upon the ground that all the privileges in use, as parts of the thing conveyed, are virtually included in the general designation of the thing as a whole. This criticism, however, has no application to the cases already cited, nor to that to which I will next refer, namely, *Thayer v. Payne* (2 Cush., 327). The plaintiff and defendant were the owners and occupants of adjoining lots of land, the defendant having derived his title from the plaintiff. At the time of the conveyance from the plaintiff to the defendant, there was a drain from the defendant's cellar leading through the plaintiff's premises to an outlet beyond. This drain was not mentioned in the deed. The drain being out of repair, the defendant entered upon the premises of the plaintiff for the purpose of opening it; and for this entry the action was brought. It was held that the defendant had a right to maintain the drain, and to enter upon the plaintiff's premises for the purpose of repairing it, notwithstanding the deed contained the following clause: "To have and to hold the aforegranted premises, with the privileges and appurtenances thereto belonging, at the time of the purchase thereof by the said Thayer and French;" and, notwithstanding it appeared that the drain had no existence at the time referred

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to in this clause, it having been constructed afterwards, but before the conveyance to the defendant. The decision was put upon the ground that, as the plaintiff owned both lots at the time of his conveyance to the defendant, and as the drain was then in existence and use, it passed as an appurtenance without being mentioned, and without even the use of the word appurtenances; and, hence, it could not be affected by the clause in the deed. It is hardly possible to conceive of a stronger case than this, for the support of the principles here advanced.

There are one or two other classes of cases, which, by the distinctions they involve, present the principles upon which this case depends in so clear a light, that it may be well to advert to them. One of these classes comprises those cases which relate to the obstruction of windows. It is well settled, that, as a general rule, if the owner of a building has windows overlooking an adjoining lot, the owner of the latter may build directly in front of the windows so as entirely to obstruct their light, unless they are shown to be *ancient*. If, however, both proprietors obtained their title from a common source, the same grantor having conveyed the tenement with the windows to one, and the ground overlooked to another, the windows cannot be obstructed; and the reason is, that the relative qualities of the two tenements must be considered as fixed at the time of their severance, each retains, as between it and the other, the properties then visibly attached to it, and neither party has a right afterwards to change them. These principles are distinctly stated in a very early case, viz., *Cox v. Matthews* (Ventris, 237), which was an action for stopping lights. Lord HALLE laid down the rule in this case as follows: "That if a man builds a house upon his own ground, he that hath the contiguous ground may build upon it also, though he doth thereby stop the lights of the other house; for, *cujus est solum, ejus est usque ad cælum*; and this holds, unless there be a custom to the contrary, as in London. But in an action for stopping of his light, a man need not declare of an ancient house; for if a man should build an house on his own ground, and then grant the

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house to A, and grant certain land adjoining to B, B could not build to the stopping of its lights in that case."

The first portion of the rule here laid down, although well established in England, has not been adopted in this State; but, on the contrary, was expressly rejected, in the case of *Parker v. Foote* (19 Wend., 309), for the reasons there given. This decision, however, has no bearing upon the doctrine, that, if a man builds a house, at the same time owning both the site of the house and the adjoining land, and then sells the house, neither he nor his grantees can afterwards build upon the vacant ground so as to obstruct the windows of the house.

I will refer to one or two of the cases on this latter branch of the rule, laid down by Lord HALE in *Cox v. Matthews*, for the purpose of showing that the principle upon which they rest is identical with that involved in the present case.

Palmer v. Fletcher (1 Lev., 122, 1 Sid., 167, S. C.), was an action for stopping lights. It appeared that the owner of land erected a house upon it, and, after selling the house to one, sold the vacant ground to another, who obstructed the windows of the house. The court held that neither the builder of the house himself, nor any one claiming under him, had a right to build upon the vacant ground so as to interfere with the existing windows, giving, as a reason, that the grantor of the house could not derogate from his own grant. KELYNGE, J., however, said, that if the vacant ground had been sold first, and the house afterwards, the purchaser of the ground might then have stopped the lights; but TWISDEN, J., denied this, saying that, "whether the land be sold first or afterwards, the vendor of the land cannot stop the lights of the house, in the hands of the vendor or his assignees; and cites a case to be so adjudged."

If we consider the reason of the rule, we shall see at once that, in this conflict of opinion, Mr. Justice TWISDEN was clearly right. The principle is that so concisely stated in *Robbins v. Barnes* (*supra*), that, upon the severance of two tenements belonging to the same owner, by the conveyance of one or both, they must be taken as they were at the time of the

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conveyance. If, therefore, the owner retains the tenement benefited, and sells that upon which the burden has been imposed, the purchaser takes the latter with the burden or servitude annexed. The time during which the lights have been enjoyed, has nothing to do with the rule in these cases. Whether they have existed for twenty years, or for a single day, they are equally protected. The doctrine has been adhered to in all the later English cases. (*Riviere v. Bower*, Ry. & Mo., 24; *Compton v. Richards*, 1 Price, 27; *Coutts v. Graham*, 1 Mo. & Mal., 396.)

I will refer, upon this point, to but a single American case, viz., *Story v. Odin* (12 Mass., 157). This was an action for stopping lights not alleged to be *ancient*. The essential facts of the case, and the point of the decision, are very clearly stated in the following extract from the opinion of JACKSON, J.: "The town of Boston, in the year 1795, owned the two pieces of land now owned by the plaintiff and defendant. They then sold to the plaintiff the piece now owned by him. This piece then had upon it a building, like that afterwards erected by the plaintiff upon the same foundations, and with doors and windows corresponding to those in the new building. *This grant being without any exception, or any reservation of a right to build upon the adjoining ground, or to stop the lights in the building which they sold*, it is clear that the grantors themselves could not afterwards lawfully stop those lights, and thus defeat or impair their own grant. As they could not do this themselves, so neither could they convey a right to do it to a stranger. No lapse of time was necessary to confirm this right to the plaintiff."

This case is important, because it expressly shows that the court considered the question, whether it is incumbent upon the purchaser to secure, by covenant, existing benefits not naturally belonging to the tenement purchased, but previously conferred upon it at the expense of other lands of the grantor; or whether the grantor must himself guard against transferring the right to such benefits. The conclusion, as we have seen, was, that such benefits remain attached to the tenement conveyed, unless the right to subvert them is expressly reserved.

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There is still another class of cases which illustrate and support the same doctrine. If a man has a house standing directly upon the line of his lot, he has, in general, no remedy against the owner of the adjoining ground, who, by excavating upon his own land, has weakened the foundation of the house so as to cause it to fall. So, also, if the house is partially supported by a building upon the adjoining lot, the owner of the latter building may pull it down, although, in consequence of its removal, the house should fall. If, however, the house and the adjoining premises have both belonged to the same individual at any time subsequent to the building of the house, the owner of the house would, upon the severance of the two tenements, have acquired a right to all the support at that time afforded by the adjoining premises. The cases on this subject are numerous, but I will refer to two only.

Peyton v. The Mayor, &c., of London (9 Barn. & Cres., 725), was an action on the case to recover damages for pulling down an adjoining house, in consequence of which the plaintiff's house was impaired and partly fell. It was held, that, as the plaintiff had not alleged or proved any right to have his house supported by the defendant's, he was bound to protect himself by shoring. It was, however, impliedly conceded, that, if the houses had been built or owned by the same person, and afterwards passed into different hands, such a right would have existed. Lord TENTERDEN, in giving his reasons for the decision, says: "It did not appear whether the two houses had been erected at the same time, or at different times: from their construction, it seems likely that they were built at or about the same time. The freehold was then in different hands: and as the governors of the hospital (the defendants) are not likely to have bought or sold in modern times, it is probable that the freehold was also in *different hands* when the houses were built." This seems plainly to imply, that, if the houses had been in the same hands when built, an easement, or right to support, would have existed.

Chancellor WALWORTH, in the case of *Lasala v. Holbrook* (4 Paige, 169), adverts to the same distinction. The object of

the action there was to obtain an injunction, restraining the defendants from excavating upon their own lot in Ann street, in the city of New York, so as to endanger the walls of a church standing upon the adjoining lot. The object of the defendants, in excavating, was to erect a building upon their lot. It was held, that, if a person, in excavating for the improvement of his own lot, digs so near the foundation of a house on an adjoining lot as to cause it to settle or fall, he will not be liable for the injury if he has exercised ordinary care and skill in making the excavation. But the Chancellor said: "There is another class of cases, however, where the owner of the building on the adjacent lot is entitled to full protection against the consequences of any new excavation, or alteration of the premises intended to be improved, by which he may be in any way prejudiced. These are ancient buildings, or those which have been erected upon ancient foundations, and which, by prescription, are entitled to the special privilege of being exempted from the consequences of the spirit of reform operating upon the owners of the adjoining lots; *and also those which have been granted in their present situation by the owners of such adjacent lots, or by those under whom they have derived their title.*" It will be seen, therefore, that there is an entire concurrence in principle among all the various classes of cases to which I have referred.

There is one other distinction, having a direct bearing upon this question, not yet adverted to. It is not every species of easement which passes as a matter of course by the conveyance of one of two tenements, or part of a single tenement, by the owner of both or the whole. Easements, or servitudes, are divided by the civil code of France into continuous and discontinuous. Continuous are defined to be those, of which the enjoyment is, or may be, continual, without the necessity of any actual interference by man; as a water-spout, or right to light or air. Discontinuous are those, the enjoyment of which can be had only by the interference of man; as rights of way, or a right to draw water.

Servitudes are also divided, by the same code, into "apparent" and "non-apparent." The analogy between the common

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law and the French code, in this respect, would seem to indicate, as suggested by Messrs. Gale & Whately, a common origin. The substance of those divisions may be distinctly traced in the common law cases; and it will be found, that those easements which, according to this classification, are termed discontinuous, pass upon a severance of tenements by the owner only when they are absolutely necessary to the enjoyment of the property conveyed. Gale & Whately, after stating the grounds upon which easements are held to pass in such cases, says: "This reasoning applies to those easements only which are attended by some alteration which is, in its nature, *obvious and permanent*; or, in technical language, to those easements only which are apparent and continuous; understanding, by apparent signs, not those which must *necessarily* be seen, but those which *may be* seen or known, on a careful inspection by a person ordinarily conversant with the subject." (Gale & Whately on Easements, p. 40.)

This distinction may serve to explain a few of the cases, particularly in Massachusetts, which might otherwise seem to be in conflict with the numerous cases which have been cited. In the present case, the servitude was not only permanent, but perfectly obvious and apparent, at the time of the conveyance to the plaintiff, and must, therefore, according to all the authorities, have passed by the deed.

The judgment should, therefore, be reversed, and there should be a new trial, with costs to abide the event.

All the judges concurring,

Judgment reversed, and new trial ordered.

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The power of the Governor to approve and sign a bill presented to him within ten days previous to the adjournment of the legislature does not cease with the adjournment.

A special act for the incorporation of a gas-light company in the city of New York is not unconstitutional by reason of the existence of a general law (ch. 37 of 1848), for the organization of such companies in any city, village or town. Whether a special act is necessary or not rests wholly in the legislative discretion.

APPEAL from the Supreme Court. Action in the nature of *quo warranto* against the defendants for assuming to be, and acting as, a corporation, without authority of law. The complaint alleged that the defendants claimed to exercise the franchise under the "act to incorporate the Metropolitan Gas-Light Company of the city of New York." It averred that the act never was a law, because the bill, having passed the Assembly April 5, 1855, and the Senate on the 13th April, 1855, was not signed or approved by the Governor until April 17, 1855—the legislature having adjourned April 14, 1855, and never having again convened during that year. The defendants demurred. The defendants had judgment at special term, sustaining the demurrer. On appeal, this judgment was reversed at general term in the first district, and the defendants appealed to this court.

Upon the argument in the Supreme Court, and in the printed points of the counsel here, it was urged that the act, if unobjectionable as to the manner of its passage, was void upon the ground, among others, that the Constitution specifically prohibits the creation of corporations by special act, except in cases where, in the judgment of the legislature, the object cannot be attained under general laws: the general act (ch. 37 of 1848) provides for the incorporation of gas-light companies in any city, village or town of the State, and is to be received

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as an expression of the judgment of the legislature that such general act is adequate for the purpose.

John Slosson and Alexander S. Johnson, for the appellants.

William M. Evarts, for the respondents.

DENIO, J., delivered the opinion of the court:

The provision of the Constitution under consideration seems to me naturally to refer to two classes of cases, namely, to bills in respect to which the two houses of the legislature and the Governor shall agree in sentiment; and, secondly, to those in which they shall differ. In respect to the former class, the provision is extremely brief. After declaring that "every bill which shall have passed the Senate and Assembly shall, before it becomes a law, be presented to the Governor," it adds, "if he approves, he shall sign it;" and this is all which is said respecting bills where there shall be a concurrence on the part of the Governor with the houses. The remainder of the section is devoted exclusively to the consideration of cases in which the Governor shall not approve of bills which have been presented to him on the part of the houses; and the subject of those, in respect to which there has been no difference of opinion, is not again adverted to.

Specific directions are given for the purpose of bringing about a reconsideration, by the Senate and Assembly, of bills to which the Governor shall have objected; and a new scrutiny is required to be had, under which such bills are to become laws, notwithstanding the Governor's objections, provided two-thirds of all the members present in each house shall so determine. The case was then to be provided for where the Governor should neglect or refuse to act upon a bill. Such neglect is not to be permitted to thwart the will of the legislature; and the remainder of the section is occupied with a provision to meet that case. It is as follows: "If any bill shall not be returned by the Governor in ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law in

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like manner as if he had signed it, unless the legislature, by their adjournment, prevent its return, in which case it shall not be a law." (Art. IV, § 9.) It is plain that this relates exclusively to bills which the Governor has neglected to approve and sign. It is such bills, and not those which he has approved and signed, which are not to become laws on account of a premature adjournment of the legislature. The provision does not qualify the mandate contained in the earlier part of the section, by which it is enjoined upon the Governor, that, if he approves of a bill, he shall sign it. I am, therefore, of opinion that there is nothing in the language of the Constitution forbidding the approving and signing of a bill by the Governor after the session of the legislature shall have terminated by an adjournment. If he cannot legally do so, it is on account of some implication arising out of the nature of the subject or of the act to be performed, or the general arrangements of the Constitution.

The leading idea of the Constitution is, that a concurrence of the legislative and executive branches shall always be sufficient to enact a statute, and that, in certain cases, the two houses alone shall be sufficient; but this is only where the objection of the executive branch shall have been considered and overruled by an extraordinary majority in the houses, and again where the Governor neglects his duty by withholding his opinion.

It is argued that, upon the construction which I have suggested, no time whatever is fixed within which bills are, in such cases, to be signed, and that, if it can be done after the adjournment, it may be done at any indefinite period thereafter; and that the inconvenience would arise, that it might remain a long time uncertain whether a measure which has received the assent of both branches of the legislature should eventually be a law or not. This consequence will certainly follow, unless there is an implication arising out of the fixing of a period of ten days for the consideration of bills presented to the Governor while the legislature remain in actual session. It is plain that the authors of the Constitution considered that period

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sufficiently long for the performance of that duty ; and I think he would not be justified in acting upon a bill after his ten days had elapsed, whether the session continued or not. But, if this were otherwise, it would not afford a reason for adding to the Constitution, by a judicial determination, a qualification of the power of the Governor to approve bills which is not contained in the instrument. The Constitution does not often prescribe detailed provisions for the regulation of the departments of the Government. A general power is usually conferred, and it is then left to the legislature to provide by law as to the time and manner of its performance. But if we concede that the limitation of ten days does not apply, and that a limitation cannot be fixed by law, I am of opinion that the concession would not authorize a determination against the existence of the right to approve bills after the adjournment. It would plainly be the duty of the Governor to act upon such bills as had been left in his hands on the adjournment, at the earliest practicable time thereafter. The nature of the duty, and the inconveniences of delay, would sufficiently inculcate the obligation of diligence in that respect. The Governor, it is true, may, by neglecting his duty, betray the trust committed to him ; and so, in a variety of ways, he may, by official dereliction, endanger the very existence of the Government.

It has been urged, by the counsel for the people, that the power vested in the Governor is not to be looked upon in the light of a participation on his part in the law-making power, but rather as an authority of an executive character, to require, under certain circumstances, a reconsideration by the legislature, of measures already adopted by it, and a larger proportion of concurring voices to be given in order to confirm what has been done. This being taken to be the nature of the power, it is further urged that it cannot be applied to bills left in the Governor's hands at the period of adjournment, although the ten days allowed for consideration had not expired ; because, as it would then be impossible for him to require a reconsideration, and as that is the only function, according to the argument, confided to him, it having become incapable of performance in

respect to such bills, he has no duty to perform concerning them. In confirmation of this view, the 1st section of the 3d article is referred to, which purports to vest the legislative power of the State in the Senate and Assembly; whence it is argued that no portion of such power can reside elsewhere. The question as to the nature of the Governor's agency raises, I think, rather a dispute about terms, than one concerning the substance of things. Whatever the authority, touching the enactment of laws, with which the Governor is clothed, shall be called, it is of the same general nature with that which is exercised by the members of the two houses. He is to consider as to the constitutionality, justice and public expediency of such legislative measures as shall have been agreed upon by the two houses, by the ordinary majorities, and be presented to him; and he is to accord or withhold his approbation, according to the result of his deliberation. This is plainly the function of a legislator. The sovereign of England, who is charged with the same duty in respect to acts of Parliament, is considered to be a constituent part of the supreme legislative power. (1 Bl. Com., 261.) It is true that his determination to disapprove a bill deprives it of any effect; while one disallowed by the Governor may yet be established by an extraordinary concurrence of votes in the houses. Thus, though the action of the executive is less potential here than in England, the quality of the act, namely, deliberating and determining upon the propriety of laws proposed to be enacted, is precisely the same. Besides making his determination, the Governor is required, in case it is unfavorable to the law, to submit his objections to the legislature, which is to examine them, and again pass upon them in the light of the discussion which they have thus undergone. To my mind, it is clear that this involves a participation on the part of the Governor, with the two houses of the legislature, in the enactment of laws. It would not be correct language to say, that he forms a branch of the legislature, for the Constitution has limited that designation to the Senate and Assembly; but it would be equally incorrect to affirm, that the sanction which he is required to give to or

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withhold from bills before they can become operative does not render him a participator in the function of making laws. The 47th number of "The Federalist," written by Mr. MADISON, treats of the separation of the great departments of the Government; and it is there shown that the concurrence of the executive magistrate with the proper legislature in the enactment of laws, as arranged in the Constitution of the United States, is not, in spirit, a violation of the principle, so strongly insisted upon by MONTESQUIEU and other writers upon constitutional government, that constitutional liberty cannot exist where the legislative and executive powers are united in the same person. Mr. MADISON considers the qualified veto accorded to the President as effecting a partial distribution of the legislative authority between him and the Congress; but argues that it is not objectionable, because neither authority can, in any case, exercise the whole power of the other. He shows, also, that in certain States, in the Constitutions of which the principle of MONTESQUIEU is laid down, in terms, with great positiveness, there is an intermingling of the legislative and executive departments in the actual arrangement of the details of Government. Our own Constitution furnishes another example; for though it is declared that the whole legislative authority shall be vested in the Senate and Assembly, still no law can be enacted which has not been submitted to the judgment of the Governor. His agency cannot, therefore, be considered as merely a power to refer back bills for further consideration by the legislature. His approval is regarded as generally essential to the enactment of laws, though his disapproval is not necessarily fatal to them, but may be overcome, where the legislature, upon a consideration of his objections, shall re-pass them by an extraordinary majority.

I am, therefore, of opinion that it is not a just construction of the power entrusted to the Governor to consider it as merely an authority to require a further consideration of bills which he shall disapprove. In one respect, the effect of the Governor's determination is different when the legislature is in session and when it is not. In the latter case, if he approves, the

concurrence of the whole law-making power is secured; precisely as though the legislature was in session. The bill has received the concurrence of all the functionaries which the Constitution requires should unite in enacting a perfect law. He cannot state objections, for there is no public body in existence to whom they can be submitted. If he neglects to act, which he will of course do if the bill is disapproved of by him, it falls to the ground by the express provisions of the Constitution; for the grounds of his disapproval cannot be passed upon by the legislature. But if the proposed law meets with his approval, there is no reason why the public will, expressed by all the official bodies and persons with whom the Constitution has intrusted the province of making laws, should fail of effect.

It has been argued, that, as the Governor cannot, in the recess of the legislature, compel the reconsideration of bills to which he is unwilling to yield his consent, he might be induced to approve those which are, in some respects, objectionable, but which contain other provisions important to the public welfare. This argument is not without force; but I think it should be assumed that he would never interpose a veto to a bill which he did not conscientiously believe ought not to become a law, and that he would never approve one to which such objections, in his opinion, existed. Should a bill of the character suggested be left in his hands at the adjournment, the remedy for the public inconvenience, which might be occasioned by the failure to enact the sound parts, would be found in the power to again call the legislature together which is vested in him for this and the like occasions.

Some other reasons, of less cogency than those which have been mentioned, were urged on the argument. They have received the attentive consideration of the judges; but we are of opinion, upon the whole case, that the act under consideration is not void on account of its having received the executive approval after the legislature had adjourned.

The other objections to the act were, we think, properly disposed of by the Supreme Court. The judgment appealed from should be affirmed.

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CLERKE, J. The principal and most interesting question presented in this case, is, whether the Governor of this State has the constitutional power to approve and sign bills after the adjournment of the legislature. It is contended, by the counsel for the respondents, that the whole legislative power of the State being vested in a Senate and in an Assembly, upon their adjournment no power existed in any other department of the government to make the bill in question a law. He endeavors to maintain this position upon the ground, that such a power would be an absolute power of determining whether a bill should become a law; which would be an exercise of legislative functions, not granted to the Governor by the Constitution.

It is confidently asserted, by the counsel of the respondent, that the Governor possesses no legislative functions, and he, consequently, maintains that as the power of signing bills after the adjournment of the Senate and Assembly, would amount to an exercise of legislation, the exercise of such a power is unconstitutional and void.

The 9th section, of article 4th, of the Constitution of this State, prescribes a general outline of the method by which laws shall be enacted. It dictates the action of all the agencies, which have anything to do with legislation, in the general sense of that word. The bill must be initiated in one of the two houses, and when it passes both, in the first instance, it is no more a law than when it passed only one. It is still necessary that it should be presented to the Governor for his approval or disapproval. By his approval, he gives it life; then, only, it becomes a law. By his disapproval, it remains inert and inoperative; and, if the two houses should deem it of sufficient importance, notwithstanding the non-concurrence of the Governor, to make it a law, a new and somewhat different course of action becomes necessary on their part. The house, to which the Governor has returned the bill, must record his objections and proceed to reconsider it. If, after reconsideration, two-thirds of the members present shall agree to pass the bill, it must be sent, together with the objections, to the other house, by which it must likewise be reconsidered; and, if approved

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by two-thirds of all the members present, it becomes a law, notwithstanding the objections of the Governor.

Now, to say that this right of the two houses to pass a bill, notwithstanding the objections of the Governor, divests him, as a branch of the government, of any legislative functions, or that he does not participate in the legislative power, is the affirmation of a mere verbal distinction. It is a distinction without a difference. That he has an agency in making, though not in framing laws: that his action in enacting them is in many cases necessary, and, without that action, numerous bills practically fail to become laws, cannot be disputed; and it is of very little consequence, indeed, whether we call his action a participation in the legislative power, or an agency in enacting laws. That he has some instrumentality, and a very important instrumentality in this work, is evident; and all we can say, is, that while he cannot make laws without the concurrence of the two houses, they can, under certain circumstances, make laws without his concurrence.

His power, indeed, in degree, is not as great as that of the Sovereign of the United Kingdom of Great Britain and Ireland; it is not an absolute veto, but a right of disapproval, which, at all events, arrests, and, in many instances, frustrates the action of the two houses.

It is conceded, by all writers on English constitutional law, that the Sovereign partakes of the legislative power. But his legislative function is not, any more than that of the Governor of this State, of the deliberative kind. As Wooddeson says: "it consists not in devising expedients, in altering or amending, or in conditional assent or dissent." It consists merely in the power of rejecting, and not in resolving.

For nearly two centuries, undoubtedly, after the origination of Parliaments in England, the Commons used the style of very humble petitioners, their petitions frequently beginning with "your poor commons beg and pray," and concluding with, "for God's sake and as an act of charity." It was, at length, however, discovered that this gave, in fact, the whole power of legislation to the King. He modified and altered bills; and

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out of the petitions and answers, new statutes were extracted and framed, without the authority of the Lords or Commons. To remedy this evil, about the latter end of the reign of Henry the VI, and the beginning of the following reign, bills were reduced in the first instance into the complete form of acts of Parliament, in which they have ever since been framed, and thus come to the Sovereign for assent or rejection. She has now no greater power in framing, altering, or resolving, than the President of the United States, or the Governor of this State. It is simply the power of rejection which the British Sovereign possesses, although to a greater extent than the President or the Governor; the difference, I repeat, being plainly in degree and not in kind.

But, it is urged, that the 1st section of article 3d of our State Constitution declares, that the legislative power shall be vested in a Senate and an Assembly. In answer to this we say that, notwithstanding this declaration, section 9 of article 4 vests a power in the Governor which we have endeavored to prove to be a participation, measurably, in the legislative power; and in construing the instrument, of course, the whole must be taken together. The action, therefore, of the Governor, in the case before us, is relieved from the difficulty, if any really existed, suggested by the counsel of the respondents. We must then return to the section under consideration, and determine, from its general import or express terms, whether that action is in accordance with the Constitution.

How is the approval or disapproval of the Governor to be expressed or ascertained? The former is ascertained by his signature, or by not returning the bill to the legislature within ten days (Sundays excepted); his disapproval is ascertained, except in the contingency, to which we shall presently refer, by his returning the bill within those ten days, and stating his objections. This power of disapproval is a conservative, and, therefore, a most important prerogative of the Governor. Whoever has reflected, by the light of history or of current events upon the usurpations, corruption and recklessness of legislative

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bodies, will at once recognize the importance of preserving it in its complete integrity. The numerous members of whom those bodies are composed, seldom feel the deep sense of responsibility by which the executive and judicial departments are generally influenced. Where duty is shared among numbers, it is seldom discharged with that solicitude which is felt when it is confined to one man, or to a few men. The consciousness of responsibility seems to be commensurate with the apportionment of duty. In proof of this we have only to consider the conduct of nearly all legislative bodies, and particularly two examples, calamitously prominent in history—the Long Parliament of Great Britain, and the Legislative Assembly and National Convention of revolutionary France, which absorbed, in a brief period, all the powers of government, and became the most odious and cruel instruments of tyranny and corruption.

Without a veto, absolute or qualified, this tendency would be unchecked; and, when conferred in the manner provided by our Constitution, it could, were it not carefully guarded, be practically annulled or defeated by the intentional or unintentional action of the legislature. One most obvious method would be by its adjournment within ten days after the bill is presented to the Governor. The Constitution provides that he shall have ten days to consider the bill, within which time he may disapprove of it; now, if the legislature adjourned within the ten days, he would be deprived of this opportunity, if there was not a further provision to meet this contingency. This is the purpose, and the sole purpose, of the latter part of the last sentence of the section. It provides "if any bill shall not be returned by the Governor within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the legislature shall, by their adjournment, prevent *its return*; in which case it shall not be a law." What object other than the one which I have indicated, could this provision serve? There could be no adequate object in declaring a bill passed by the two houses, but signed after the adjournment, to be no law.

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Both having concurred and adopted the bill, and the Governor afterwards concurring and signing it, no purpose, whatever, in such case, could be fulfilled by a prolongation of the session. No purpose indicated or declared by the Constitution, could be effected or aided by it. When the Governor signs a bill during the session, he does not—let it be borne in mind—return it to either house. The houses have nothing further to do with it. He frequently, no doubt, as a matter of information, apprises them, during the session, that he has signed a list of bills; but he is under no necessity or obligation to do so. In no instance, when he signs a bill, does he return it to either house; he sends it to the Secretary of State, who files it in his office.

But if he should disapprove of a bill, and has not time to express his disapproval, in consequence of the adjournment of the two houses, then there is a very manifest reason why it should be declared to be no law. That reason is, as I have intimated, the protection of this power of disapproval against the sinister designs of a bare majority, in the first instance, of the two houses. Without this provision, I repeat, the Senate and Assembly could nullify this power. For, as in a previous part of the sentence, it is declared that unless the Governor shall return the bill within ten days it shall be deemed a law, the legislature, by adjourning, would deprive him of this right, unless it was further provided to be no law, in case of their adjournment, if he should disapprove of it.

Again, not only does the manifest object of the provision require this interpretation, but the language employed admits of no other. Let us again read the last sentence of the section. It says: "If any bill shall not be returned by the Governor, within ten days (Sundays excepted) after it shall be presented to him, the same shall be a law in like manner as if he had signed it, unless the legislature shall, by their adjournment, prevent its *return*." Of course the first part of the sentence means that the bill shall become a law, unless the Governor returns it, with his disapproval and reasons, within ten days; so the latter part can contemplate nothing but the return, with

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his disapproval and reasons, which may be prevented by the adjournment. I have shown it is only when the Governor disapproves that the return of a bill to the legislature is contemplated; when he signs a bill he does not return it; he sends it, as I have said, to the Secretary of State, who records it. The words, then, "prevent its return," do not and cannot apply to his approving and signing a bill.

To recapitulate: The Constitution of the State of New York, in no part of it, expressly or impliedly, prohibits the Governor from signing bills after the adjournment of the Senate and Assembly. The words in the concluding sentence in the 9th section of article 4th, which have been supposed to import such a prohibition, apply, solely, to his disapproval of a bill in a certain event, and are designed for the protection of his right of rejection. The whole section prescribes the manner of approval and of disapproval. If he retains a bill, without signing it, for ten days during the session, his approval is to be presumed; but, if he retain it after the adjournment, without signing it, his disapproval is to be presumed, and it fails to become a law.

If the terms of the section admit of no other interpretation, of which I can entertain no doubt, it seems superfluous to consider the argument of precedent, or practice of the executive, under other constitutional governments. But, it may be well to observe, that with regard to the practice of the British Government, no reason exists there why the approval or disapproval of bills by the Sovereign should be delayed after the prorogation of Parliament. The Sovereign exercises all her various powers and prerogatives in conformity with the advice of her council or cabinet, the members of which alone are individually responsible for the acts of the government. Every member of her cabinet is a member of either the House of Commons or the House of Lords. It is the duty and practice of each, vigilantly, to watch the progress of every bill through the house to which he belongs. He generally takes an active part in considering and discussing it, and, before the end of the session, is fully prepared to advise the Monarch to grant or to withhold the

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royal assent. In fact the latter prerogative has never been exercised since 1692, when William the III refused his assent to the bill for triennial parliaments, which, however, he granted two years afterwards.

With regard to the practice of the President of the United States and the Governors of the several States, I believe the former has always signed bills before the adjournment of Congress, and many of the latter are in the habit of doing so after the adjournment of the legislative bodies with whom they are respectively concerned. But as far as mere custom or practice can have any bearing on the question before us, I can only say that the practice of the supreme executive of every government, in a matter of this kind, must be guided by the express or implied language of the Constitution under which he acts, or, in the absence of any such guidance, by necessity or expediency. The President of the United States is probably able, without serious inconvenience, to examine every bill before the adjournment of Congress. At all events, if this question depended upon precedent, the practice which has obtained in our own State, may surely be adduced against that of any other government, and should be considered controlling. We have seen that it has been the practice of many Governors of this State, for a considerable number of years, to sign bills after the adjournment of the legislature.

With regard to the other constitutional objections presented on the demurrer, we entirely concur with the judge who decided the case at special term.

The decision of the general term should be reversed with costs.

COMSTOCK, Ch. J., dissented; all the other judges concurring,

Judgment reversed and judgment at special term affirmed.

VAN DUZER, President of the New York Exchange Bank,
v. HOWE *et al.*

51	531
114	136
21	531
170	65

The drawer of a bill of exchange for \$1,200 paid \$50 to an accommodation indorser for his indorsing, procuring another indorser, and obtaining its discount. From the proceeds, the indorser retained \$150 previously loaned by him to the drawer: *Held*, that the draft was not affected by usury.

The head-note to *Steele v. Whipple* (21 Wend., 103) corrected, and the case itself questioned, by DENIO, J.

A party who entrusts another with his acceptance in blank is responsible to a *bona fide* holder, although the blank be filled with a sum exceeding that fixed as a limit by the acceptor.

Though the filling of the blank in violation of the agreement of the parties, be a forgery, the acceptor is estopped from setting up the fact.

The complaint by the president of a banking association did not aver any negotiation of the bill to the bank. An amendment, supplying such averment, is properly allowed, and, if not so, is a matter of discretion not reviewable on appeal.

APPEAL from the Supreme Court. Action on a bill of exchange by indorsee against acceptor. The bill purported to be drawn by H. L. Webb, on, and to have been accepted by, the defendants, under the name of O. B. Howe & Co.; and it was made payable to the drawer's order, and was indorsed by him and by James L. Dewey and Adon Smith. It was for \$1,200, at ninety days, and was dated June 9, 1855. The defendants took issue on the drawing and accepting of the bill, and also set up the defence of usury. The facts proved at the trial were, that Webb applied to the defendants, at their place of business at Elmira, to accept for his accommodation, to enable him to raise money, saying that he wished to obtain a sum not exceeding \$1,000. He had three drafts, of the same tenor with the one given in evidence, except that the amount was left blank in each. The defendant, Howe, wrote an acceptance on each, in the name of his firm, and delivered them to Webb, with directions to fill them up for sums not exceeding, in the aggre-

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gate, \$1,000, to which Webb assented, and took them away. He filled up the draft sued on with the sum of \$1,200, and applied to Dewey to indorse it and procure it to be discounted, agreeing to pay him \$50 if he would do so. He at that time borrowed of Dewey \$100, and afterwards, and before the draft was discounted, \$50 more. Both Webb and Dewey, who were examined as witnesses, testified that these sums were not advanced on account of the draft, but were a borrowing by Webb of Dewey, without reference to it. Dewey indorsed the bill, and obtained Smith's indorsement, and procured it to be discounted by the plaintiff's bank; and the proceeds were placed to his own credit. After deducting the \$150 loaned and the \$50 which Webb was to give him for his services, he paid the balance to Webb by his check on the bank.

The defendants' counsel insisted that the acceptance was a forged instrument, upon which no recovery could be had; but if this were not so, then that it was usurious in its inception, it having been, as he contended, negotiated in the first instance to the witness Dewey; and he asked to have the jury directed to find a verdict for the defendants. The judge refused to hold that the acceptance was a forgery; and, as to the allegation of usury, he instructed the jury to inquire whether the paper was negotiated in the first instance to Dewey, and said, if it was, it was usurious in the hands of the plaintiff as subsequent indorsee; but, if it was discounted in the first instance by the bank, Dewey acting as agent, and indorsing for Webb's accommodation and procuring Smith's indorsement, the exacting of \$50 for doing so did not make the draft usurious. The defendants' counsel excepted, and the jury found a verdict for the plaintiff. There was another point made on the argument, the facts respecting which are sufficiently stated in the opinion of the court. The judgment was affirmed at a general term in the first district, and the defendants appealed to this court.

John H. Reynolds, for the appellant.

John K. Porter, for the respondent.

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DENIO, J. There is no pretence, on the evidence, for the allegation of usury. Both witnesses who spoke of the loan of \$150 by Dewey to Webb stated that it was not made on the security of the bill; and the evidence is uncontradicted that Dewey acted in what he did as Webb's agent, and not as the purchaser or holder of the paper. It is true that, in making title to the bill, when pleadings were technical, the plaintiff would have set out an indorsement and delivery by Webb to Dewey, and by the latter to the bank, and would thus have stated, in effect, that Webb was at one time the holder, and then, inasmuch as he had \$50 for his connection with its negotiation, it might be said that the bill was infected with usury. But, in inquiring at what stage of a transaction respecting a negotiable bill or note it became operative as commercial paper, successive indorsements are not necessarily regarded as separate transfers of the paper; but the inquiry is, in whose hands it first became available in a sense which would enable that party to maintain an action upon it against the prior parties. One who indorses for the accommodation of a prior party does not thereby become the holder of the bill, nor can he maintain an action upon it until he has taken it up by paying the amount to a subsequent purchaser. The fact that the plaintiff placed the proceeds of the discount to the credit of Dewey was of no materiality, after it was shown that the latter acted in procuring the discount as the agent of Webb, and not as the owner of the paper.

The defendants' counsel relies upon the case of *Steele v. Whipple* (21 Wend., 103), as showing that, under circumstances precisely like those here disclosed, the paper would be usurious in the hands of the bank; and it must be admitted that the reporter's note favors that conclusion. But, on looking into the case, it will be seen that the note overlooks the true point decided. A note had been discounted by a bank, an indorser on which, for the accommodation of the maker, had been paid a sum of money for indorsing it; but the action was not by the bank, nor on that note. Another note had been given to the indorser, a part of the consideration of which was

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the premium which had been paid him for indorsing the first mentioned paper. That note he transferred to the plaintiff in the suit, and upon it the action was brought. The court, considering the exacting the premium for indorsing the first note to be in its nature usurious; and the note sued on having been given to the indorser in part to secure that premium, they held the last mentioned note usurious in the hands of the plaintiff. The note of the reporter leads to the inference that the first note was held usurious in the hands of the bank. But in the opinion of the court, delivered by Judge COWEN, it is expressly said that there was no usury in the bank. "Had the original note," he says, "rested there [in the bank], or in the hands of a *bona fide* transferee of the bank, and either had brought an action on the original note, or a substituted one, such action would lie." The principle really decided has been questioned, if not overturned, by subsequent cases; but, as the point is foreign to the present question, it is unnecessary to pursue the subject. (See *Barber v. Ketchum*, 4 Hill, 224; *S. C.*, 7 *Id.*, 444; *More v. Howland*, 4 Denio, 264.)

The court, in the present case, left it to the jury to say whether Dewey became the holder of the note, by means of the loan to Webb, while it was in his hands; and they found he did not. I doubt whether the evidence would have justified the submission; but the defendants have no cause to complain of it.

The defendants wrote their acceptance on the bill, and entrusted it to Webb while it was in blank as to the amount, relying upon his promise that he would not fill the blank for a greater sum than \$1,000. He violated his promise, by inserting \$1,200, and causing it to be negotiated for that amount. The plaintiff discounted it without any knowledge of the fraud, and paid the whole proceeds to the agent of Webb; and the question now is (if it can be said to be a question), which party is to suffer on account of the misplaced confidence reposed in Webb. It was the defendants, who, by entrusting their blank acceptance to the disposition of Webb, enabled him to commit the fraud. The plaintiff relied upon the defendants' genuine

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signature, attached to an instrument of a definite legal character. No want of caution is imputable to him, for it is the constant practice of business men to rely upon the genuine handwriting of others, when found attached to commercial paper, without inquiring as to the circumstances under which it was written. Upon general principles, therefore, the defendants ought to encounter the loss, rather than the plaintiff. But the point has been settled by a long course of decisions. In a case in the Court of King's Bench, decided in 1780, the action was upon a promissory note by the indorsee against the indorser. The note was made by one Galley, who, being desirous of raising money, had procured the defendant to indorse his name upon five engraved notes, in blank as to the date, amount and time of payment. Galley filled them up with different sums and dates, as he chose, and the plaintiff, a banker, discounted one of them, which was the note sued on. The defendant insisted that the signature of the defendant, when attached to the note, was a mere nullity, and that Galley had no power to change its character; and upon this position, he prevailed at the trial. But on a rule to show cause, the court determined that the defendant was liable as indorser. "There is nothing so clear," said Lord MANSFIELD, Ch. J., "as this point. The indorsement of a blank note is a letter of credit for an indefinite sum. The defendant said, 'Trust Galley to any amount, and I will be his security.' It does not lie in his mouth to say the indorsements were not regular." (*Russell v. Langstaffe*, Doug., 516.) The case is stronger than the present, in one respect, for it appeared that the plaintiff knew that the indorsement had been written on a blank note.

A similar case is reported in 1 H. Blackstone, 313. The defendant wrote his name on a piece of paper entirely blank, and delivered it to Livesay & Co., for the purpose of drawing a bill of exchange for such sum, payable at such time and to such person and persons, as they should see fit. A bill for over £1,500 was accordingly written on the paper, the defendant's name standing for the drawer, and Livesay & Co. becoming the acceptors, which was negotiated to the plaintiffs; and

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they were allowed to recover the amount, though aware at the time they received the bill of the circumstances attending the signature of the drawer. (*Collis v. Emmett*.)

It did not appear, in either of these cases, that the blank paper had been filled up and negotiated in violation of the agreement between the party sought to be charged and the one to whom he had intrusted his signature; but in *Schultz v. Astley* (2 Bing., N. C., 544; 29 Eng. C. L., 414), a person desirous of raising money wrote his name across ten slips of stamped blank paper, and entrusted them to an advertising money-lender. Several of them were filled up by a stranger as bills of exchange for £500 each, with a drawer and indorser, in such manner that the blank signature stood for the name of an acceptor, and were negotiated to the plaintiff for a cargo of wheat. The defendant was held to be liable as acceptor, though he never received a farthing for the bills, and had no interest in or knowledge of the transaction upon which they were negotiated. The principle was assumed to be, that a party is bound by his acceptance, written on a blank piece of stamped paper, to the extent of such sum as the stamp will cover. The court said, a blank acceptance was an acceptance of the bill which might be afterwards put upon it, and that it did not lie in the mouth of the acceptor to say that the drawing and indorsing of the bill were irregular. So, in *Montague v. Perkins* (22 Eng. Law. and Eq. R., 516), the defendant was sued as acceptor of a bill. It appeared that he had entrusted his blank acceptances to one Swinburn, to take up other bills which he had accepted for his accommodation. This was in and prior to 1840, and twelve years afterwards, in September, 1852, Swinburn wrote a bill of exchange for £200 on one of the blank acceptances, payable to his own order, and it was negotiated to the plaintiff. The jury found that the blank was not filled up within a reasonable time, and gave their verdict for the defendant. Leave was reserved to the plaintiff to move to enter a verdict in his favor; and it was held, after elaborate argument, that the defendant was liable on the acceptance, and judgment was given accordingly. The defendant's counsel

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argued that the authority to Swinburn was to fill up the bill within a reasonable time. But the Chief Justice said, this was not the case with reference to the rights of a *bona fide* holder for value. He added: "The rules applicable to the question of authority on this bill of exchange do not differ from those which ought to govern the question if it arose in the ordinary case between principal and agent. In the case of a blank acceptance, *prima facie* the person giving it gives the person to whom it is given an opportunity to fill it up for the amount and for the time limited by the stamp laws. As between these two, there may be secret stipulations binding upon them, but not binding as between the public and the person giving the blank acceptance." There are several other cases to the same general effect in the English books, and the principle, as has been remarked, seems perfectly settled. (See *Cruchley v. Clarence*, 2 Mau. & Selw., 90; *Atwood v. Griffin, Ry. & Mood.*, 425.) The doctrine has been followed in this country. (*Violet v. Patten*, 5 Cranch, 151; *Putnam v. Sullivan*, 4 Mass., 45.)

In this State, the courts have fully recognized the principle. *Mitchell v. Culver* (7 Cow., 360), and *Mechanics' and Farmers' Bank v. Schuyler* (*Id.*, in a note), were both cases of indorsements of notes in blank as to their date; and the dates were filled up, without the knowledge of the indorsers, of a day prior to that on which they were drawn and indorsed, so that the day of payment arrived earlier than could have been contemplated by the indorsers. The Supreme Court, on the authority of the cases to which I have referred, held the defendants liable, and laid down the rule that an indorsement on a blank note, without sum or date or time of payment, will bind the indorser for any sum, payable at any time which the person to whom the owner entrusts it chooses to insert.

The defendants' counsel relies upon several adjudications in the criminal courts in England, in each of which it was held that a person, having a blank signature of another which he was authorized to fill up with a check or bill for a limited amount, and who wrote one for a larger amount, was guilty of forgery. (*Rex v. Hart*, 7 Carr. & P., 652; *Rex v. Wilson*,

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2 Carr. & Kirwin, 527; *Reg. v. Bateman*, 1 Cox's Cas., 186.) The difficulty which the doctrine of these cases presents, does not seem ever to have been urged by counsel or noticed by the court in the civil actions brought upon such paper, though it would seem incongruous to hold that any recovery could be had upon an instrument which was in itself a forgery. The positions of the two classes of cases can only be reconciled by holding the authors of the blank signatures estopped from setting up against a *bona fide* holder, who has paid value, that the paper was not his genuine act. A fiction of nearly the same kind must be resorted to, to sustain an action in favor of the *bona fide* holder of negotiable paper which has been stolen and put in circulation by the thief. Such holder must make title through a felony, and yet nothing is clearer than that an action may be maintained upon paper thus circumstanced. (*Peacock v. Rhodes*, Doug., 633; *Miller v. Race*, 1 Burr., 452.) The principle which lies at the foundation of these actions, I think, is, that the maker who, by putting his paper in circulation, has invited the public to receive it of any one

- having it in possession with apparent title, is estopped to urge the actual defect of title against a *bona fide* holder. Our statute provides that the right of action of any person injured by any felony shall not, in any case, be merged in such felony, or be in any manner affected thereby. (2 R. S., 292, § 2.) This would enable the plaintiff to recover against Webb, though his act in filling up the bill was a forgery; but the provision does not seem sufficiently broad to enable him to recover against the defendants, who have not been guilty of any crime, and to whom the doctrine of merger would never have been applicable. But, if the two apparently hostile positions which the cases present are really incapable of being reconciled, I am in favor of sustaining those which uphold the civil action. The decisions of that class are so numerous and consistent, and the principle is so uniformly and confidently acted on by business men, that it would be eminently dangerous to depart from it. It is better that the wrongdoer should go unpunished until the legislature shall have provided a suitable penalty for his illegal act.

The People v. Minck.

The defendants' counsel claim that a fatal error was committed by the Supreme Court in allowing the complaint to be amended on terms. In the first instance, it did not contain any allegation to show that the bill had been negotiated to the plaintiff's bank, though he named himself as president of the association. The intention to enforce a claim in favor of the bank was plain enough to a common intent, though the pleading was probably insufficient in the point suggested. The court allowed the plaintiff to amend on payment of costs. Issue was then joined on the amended complaint, and the case was afterwards tried. The order was no doubt right; but, if it was not, the question being one of discretion, it would not be reviewable here. The case of *Davis v. The Mayor, &c.* (4 Kern., 506), on which the defendant relies, has no application. There, after a trial, in which it appeared that the plaintiffs could not succeed on the evidence, another party, in whose favor the evidence disclosed that a right of action existed, was allowed to be introduced, and judgment was given in his favor. We held this to be erroneous, on the ground that no discretion existed in the case.

None of the defendants' positions appearing to be well taken, the judgment of the Supreme Court must be affirmed.

All the judges concurring,

Judgment affirmed.

THE PEOPLE, *ex rel.* Stone, v. MINCK.

Where a public document, prepared by a sworn officer, is produced by the officer to whose custody the law entrusts it, the party offering it in evidence is not required to explain a rasure and alteration visible upon its face and appearing to have been made at the same time and by the same hand as the obliterated letters and figures.

The return of inspectors of elections, not otherwise impeached than by such alteration, is *prima facie* evidence on *quo warranto* of the number of votes cast for a candidate.

The People v. Minsk.

ACTION in the nature of *quo warranto*, to try the defendant's title to the office of trustee of common schools, for the twentieth ward of the city of New York. Upon the trial, it was conceded, the question turned upon the number of votes received by the relator in the third election district. The plaintiff offered in evidence the original statement or return of votes, made by the district canvassers (inspectors of election), and filed in the office of the clerk of the common council, who was a witness, and produced it. On inspection, it appeared that the number of votes originally written, both in letters and figures, opposite to the name of the relator was two hundred and sixty-six. These letters and figures had however been erased, and over them was written (and repeated in figures over the original figures), two hundred and seventy-three. If the relator received less than two hundred and seventy votes, he was not elected. The defendant's counsel objected to the evidence until the rasure and alteration were explained. The judge overruled the objection, and the defendant excepted. There was a verdict for the plaintiff, and judgment of ouster against the defendant having been rendered at general term in the first district, he appealed to this court.

John T. Doyle, for the appellant, argued that while the district canvassers are living, and can be produced as witnesses, their statement is not admissible as primary evidence to prove the number of votes cast for a particular candidate, especially in a proceeding instituted to impeach it directly. They are required to state the whole number of ballots, and also to make a statement of the whole number of ballots of each particular kind; which is to be partly on a specimen of such ballots, and partly on the paper to which it is attached. These are primary facts as to which their return may be evidence. But the statement of the number of votes taken for each candidate, is a mere deduction of law; for it is simply the opinion of the canvassers as to how many votes should be counted for each candidate on that state of the balloting which they have ascertained and certified.

Cornelius A. Runkle, for the respondent.

The People v. Minck.

COMSTOCK, Ch. J. The right to the office in question, depended, at the trial, on the vote of the third election district of the twentieth ward, there being no dispute in regard to all the other districts. In respect to that district, the number of votes given to the plaintiff and defendant, respectively, was proved only by the statement or return of the district canvassers. If this was properly received in evidence, the plaintiff had a majority of four votes, and was duly elected. We entertain no doubt upon this question. The election laws do not, in terms, declare that the return of votes made by inspectors of election, or canvassers, as they are called in the city of New York, shall be evidence in courts of justice, but they are so upon well established general principles. (Laws of 1842, pp. 109, 122, 123; Laws of 1857, vol. 1, pp. 597, 894; 1 Greenl. Ev., §§ 483, 484, *et seq.*; 1 Starkie Ev., 195.) In this case it seems that the number, two hundred and sixty-six, had been first written upon the statement as the plaintiff's vote; that this number was erased and two hundred and seventy-three written over it, as the return appeared when introduced in evidence. We think the plaintiff was not called upon to explain this erasure or alteration. We are to assume, because the contrary is not shown or suggested, that on an inspection of the writing, at the trial, the larger number was plainly written over the smaller, so as to leave no doubt as to the actual reading of the document, and that the alteration appeared to be made with the same hand as the residue of the statement, with the same ink, and at the same time. The law does not presume wrong where none is proved, and I think that even a private writing would be receivable in evidence where no other circumstances appear than those here assumed. But election returns are documents of a public nature, made out and filed in the proper office, under the responsibilities of an official oath, and they remain in the custody of a sworn public officer. The return in question, so far as we know, had been faithfully kept by the proper officer until he produced it at the trial, and there is no room for a presumption that it had been fraudulently altered.

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The ruling at the trial, being correct, therefore, in regard to the admission of this statement, as evidence, there was no other question in the case material to the result. The judgment must be affirmed.

All the other judges concurring,

Judgment affirmed.

21 542
140 584

THE BANK OF TOLEDO v. THE INTERNATIONAL BANK.

User of corporate franchises, under color of an act authorizing the incorporation, together with recognition of such character by the defendant in his dealings, is evidence of a corporation *de facto*, available to a foreign corporation suing in this State, as well as to a domestic one.

APPEAL from the Superior Court of the city of Buffalo. Upon the trial, the defendant moved for a nonsuit, on the ground that the plaintiff had not proved its incorporation, upon which an express issue had been made by the pleadings. The specific point of the objection was, that there was no evidence that the Governor of Ohio had issued his proclamation declaring it a corporation, as required by the laws of that State. The nonsuit was denied, and the defendant excepted. The judgment was affirmed at general term, and the defendant appealed to this court.

John L. Talcott, for the appellant.

John Ganson, for the respondent.

DENIO, J. The only question arising upon this appeal is, whether the plaintiff sufficiently proved itself to be a corporation under the laws of the State of Ohio. The statute of that State authorized individuals to associate and form banking companies, by signing and acknowledging a certificate stating

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certain particulars, and causing it to be recorded in the office of the recorder of the county. The act further provides for an examination of the institutions which shall have recorded certificates, by the bank commissioners or a special agent appointed by them, to ascertain whether they have complied with the act; and the commissioners are to certify to the Governor as to such as shall have been approved of, and if he is also satisfied that the law has been complied with, he is to issue his proclamation, setting forth that they are authorized to commence and carry on the business of banking.

The plaintiff (the issue being on its having been created a corporation) proved that a certificate, containing the requisites mentioned in the act, had been recorded in the proper county, in the year 1845; and it examined its cashier, who proved that it had been doing business as a bank, under its articles of association, at Toledo, for several years last past, and that the defendant, during all that time, had acted as its collecting agent at Buffalo, corresponding with it and addressing it letters under its corporate name. The Supreme Court held the proof sufficient, and the plaintiff recovered.

I am of opinion that the judgment was in accordance with the decisions of this court in the cases of *The Methodist Episcopal Church v. Pickett* (19 N. Y., 482), and *Eaton v. Aspinwall* (*Id.*, 119), and that it ought to be affirmed.

CLERKE, J., also delivered an opinion for affirmance, and all the judges concurred.

Judgment affirmed

WARHUS, Administrator, &c., v. BOWERY SAVINGS BANK.

A regulation of a savings bank, requiring the production of the depositor's pass-book before he should be entitled to receive any payment, is reasonable in a general sense; but proof of the loss of the pass-book, or inability to find after proper search, will excuse the non-production, and entitle the depositor to his money.

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The rule applied as against the administrator of an intestate, who was a German, having very slight knowledge of the English language, and charged with notice of the regulation only by its being posted, in English, in the banking-room, and printed on the first pages of a signature-book which he subscribed, and in his pass-book.

APPEAL from the Superior Court of the city of New York. On the trial, the plaintiff proved these facts: Frederick Warhus, the appellant's intestate, on the 20th December, 1852, opened an account, by a deposit with the respondent, a bank for savings in the city of New York. At the time of the deposit, the intestate, who was a German, understanding but a few of the most familiar words of our language, signed the rules and regulations of the bank, and received a pass-book, in which the deposit was entered, and which had pasted in the front part thereof the rules and regulations of the bank. One of those rules was, that "no person shall have the right to demand any part of his principal or interest without producing the original book, that such payment may be entered therein." The intestate continued to make deposits and draw money from the bank during his life, and on January 1, 1855, there was a balance in his favor, on the books of the bank, amounting to \$198.68. On the 2d of August, 1854, letters of administration on the estate of Frederick Warhus were granted to the plaintiff, who resided at Buffalo where the intestate died, and in the same month he demanded of the defendant the moneys standing on the books to the credit of the intestate. The bank officers required the production of the pass-book, but it was not produced, nor any reason given for its non-production, except the plaintiff said he had it not. The officers made no inquiry as to whether search had been made for the pass-book, nor did they suggest in any way that proof of its loss, or of ineffectual search for it would be accepted as an excuse for its non-production. The defendant moved for a nonsuit: the judge thereupon offered to allow the plaintiff to prove that the pass-book had been lost or destroyed, or that, on a proper search made for it, it could not be found. The plaintiff making no offer of such evidence, the complaint was dismissed. The

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judgment having been affirmed at general term, the plaintiff appealed to this court.

Isaiah T. Williams, for the appellant.

John H. Reynolds, for the respondent.

DAVIES, J. It is provided, in and by the 6th section of the act incorporating the defendants (Laws of 1834, ch. 229), that the corporation shall receive, as deposits, all sums of money that may be offered for that purpose; "and such deposits shall be repaid to each depositor when required, and at such times and with such interest and under such regulations as the board of managers shall from time to time prescribe;" and which regulations were to be put up in a conspicuous place in the room where the business of the corporation should be transacted.

In pursuance of this authority, the defendants adopted the rule, or by-law, above quoted, and had the same posted in a conspicuous place in the room where their business was transacted, and a copy was pasted in the front part of each depositor's book. The question presented is, whether the plaintiff can recover without the production of the pass-book, or giving some evidence of its loss or destruction, or in some way accounting for its non-production. It is contended, on the part of the plaintiff, that he can. In the first place, it is to be remarked, that the legislature evidently contemplated that some rules and regulations in reference to the repayment of money to the depositors would become necessary. They were called for, alike for the protection of the depositor as well as the bank. In pursuance of the authority thus conferred, the defendants adopted the regulation, that, on repayment of any moneys, principal or interest, the pass-book should be produced, to the end that such payment might be entered therein, and reasonable certainty would thereby be attained that the payment was made to the person legally entitled to receive it. This regulation was put up in accordance with the require-

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ments of the act of incorporation, and was assented to by the depositor, and we are bound to hold that it was part of the condition upon which the defendants received the deposit.

We see nothing unreasonable in this regulation; and we fail to come to the conclusion that it was intended, or does in fact work any forfeiture of the depositor's money. It is to receive a reasonable construction, and not to be perverted to consummate fraud or work injustice. If the depositor, when he wishes to withdraw his money, cannot do what the regulations of the defendants require, and what he has agreed and stipulated to do, he must certainly do the next best thing—account for the non-production, and show its loss or destruction. There would be no safety, either to the bank or to the depositor, if the former was bound to pay, on demand, without the production of the pass-book as the evidence of authority to receive the money by the person demanding it; or, if it is not produced, the same security to both requires some excuse for its non-production to be given. The case was put as favorably for the plaintiff, by the judge at the trial, as it could have been; and as he did not avail himself of the privilege given to prove that the pass-book had been lost or destroyed, or that, on proper search made for it, it could not be found, but chose to place himself upon his strict right to the money upon a demand for it, without any compliance with this regulation, or offer to excuse such non-compliance, he must abide by the consequences of the position assumed. We think the grossest injustice would follow from the adoption of the principle upon which it is sought to maintain this action. On the contrary, we think that, if we hold that the pass-book should have been produced, or proof given of its loss or destruction, or that proper search had been made for it, and that it could not be found, no injustice is done to either party, but that the rights and security of both are alike preserved. If the plaintiff makes such proof, he will be entitled to his money on demand; and if the bank should then refuse payment of it, an action could be maintained. We are clearly of the opinion that, upon the facts

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appearing in this case, this action cannot be maintained, and that the complaint was properly dismissed.

The judgment of the Supreme Court is therefore affirmed, with costs.

All the judges concurring,

Judgment affirmed.

91	547
114	278
91	547
118	178

 CARMAN v. PULTZ *et al.*

The tender of a deed to one of the joint contractors for the purchase of land is sufficient: upon his refusal to accept, the vendor is under no obligation to make a tender to the other.

Upon appeal, this court will presume nothing in favor of the party alleging error; but, if compelled, by the imperfection of a referee's report or the statement of facts, to resort to presumptions, will adopt such only as will sustain the judgment.

Accordingly, where the case shows a defect in the deed tendered which afforded a good reason for refusing to accept it, but might have been remedied if pointed out, it cannot be presumed, in the absence of any statement to that effect, that the refusal was put on that ground; but, on the contrary, in support of the judgment, it is to be presumed that the refusal was on some other untenable ground, or no ground at all.

APPEAL from the Supreme Court. Action upon a promissory note, set out in the complaint as follows:

"\$500.

Po'keepsie, Aug. 20, 1853.

On the first day of May, next, we, or either of us, promise to pay Charles Carman, or order, five hundred dollars, value received.

"H. F. PULTZ.

"HENRY R. POWER."

The answer admitted the execution of the note, but averred that it was given without consideration; that on the day of the execution of the note, the parties to the action entered into a

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contract, by which the plaintiff agreed to sell to the defendants certain parcels of land in the county of Hamilton, for the sum of \$3,600, of which \$1,500 was to be paid on the first day of May, 1854, and the balance was to be secured by bond and mortgage upon the premises; and that the note in suit was given in part payment of this sum of \$1,500. This contract, as set forth in the answer, contained the following provision:

"And the said party of the first part (the plaintiff), also agrees that upon receiving the said sum of \$1,500, at the time heretofore mentioned; he will execute and deliver to the said parties of the second part, a good and sufficient deed for the conveying, and assuring to them, the said parties of the second part, the fee simple of said premises, free from all incumbrances, except as to taxes and assessments which may accrue from the execution of these presents, until the first day of May next; which deed shall contain a general warranty and the usual full covenants."

The case was referred to a referee, who reported as follows:

"Having heard the proofs and allegations of the parties to this action, I find and report as follows:

"1. That the consideration of the note mentioned in the complaint, was the agreement set forth in the answer, and said note was given as part of the \$1,500 payable thereby.

"2. That the plaintiff tendered a deed of the lands contracted to be sold by said agreement, on the 9th of May, 1854, to Henry R. Power, only, and not before then.

"3. But that the performance, or tender of performance of the contract, was prevented on the 1st of May, 1854, and delayed until the tender was made, at the instance and request of the defendants.

Upon these facts, my decision is, that the plaintiff is entitled to judgment against the defendant, Henry F. Pultz, for the amount of his note and interest amounting to \$538.00."

A judgment was entered upon this report for the plaintiff, which, upon appeal to the general term of the Supreme

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Court, was affirmed. The defendant, Pultz, appealed to this court.

Amasa J. Parker, for the appellant

J. H. Jackson, for the respondent.

SELDEN, J. By the contract between these parties, the defendants, Pultz and Power, agreed to pay to the plaintiff the sum of \$1,500 towards the purchase money of the land, to be conveyed on the 1st of May, 1854, and the plaintiff, on his part, agreed that upon receiving the said sum of \$1,500, at that time he would execute and deliver a deed. There can be no doubt whatever that these are dependent covenants, and that either party, in order to recover against the other, must show performance, or something equivalent to performance upon his own part. The finding, by the referee, that performance of the contract was delayed at the instance and request of the defendants, until the time when the tender found by him was made, of course excuses the omission of the plaintiff to make the tender on the day mentioned in the contract. The defendants cannot take advantage of a delay produced by their own act. The tender of the deed, therefore, upon the 9th of May, 1854, has in all respects the same effect upon the rights of the parties as if made upon the 1st of May, as required by the terms of the agreement.

But the referee has found that such deed was tendered to Henry R. Power, one of the defendants, only; and this presents the principal question in the case, viz.: whether, upon a contract like this, it is sufficient for the vendor to tender a deed to one of the two joint purchasers, in the absence of the other; or, whether, when the one to whom the tender is made refuses to accept, he must also make a tender to the other. The referee has not found, in express terms, that the defendant, Power, refused to accept the deed; but this is plainly to be inferred from the tenor of his report.

No authority was cited upon the argument upon this question, nor am I aware that it has ever been decided; but I am

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clearly of the opinion that when two persons have entered into a joint contract for the purchase of lands, if one of them refuses to accept a deed tendered pursuant to the contract, the vendor is under no obligation to make a further tender to the other. As between the vendor and the vendees, the contract is single. The latter constitute, so far as the rights of the vendor are concerned, but one party. Each is holden to him for the performance of the entire contract, and he is not bound to recognize any duality of rights as existing between them. He could not be compelled to execute separate deeds for their respective interests, and, as one deed only was required, it follows that one alone could accept for both. Either of the vendors, therefore, being authorized to accept performance on the other part, and bound to complete performance on their own, upon receiving a tender of a conveyance would be under obligation to accept it and make the corresponding payment; and his neglect or refusal to do so, would be a clear breach of the contract on the part of such vendees. Can they then, after having thus broken the contract, on their own part, defend themselves upon the ground of a subsequent omission on the part of the vendor? I think not.

But it is said that the plaintiff did not tender such a deed as the contract requires, and hence the defendants were not bound to accept it. The contents of the deed tendered do not appear from the body of the referee's report; but where documentary evidence is introduced upon a trial, and such evidence is referred to in the statement of facts contained in the Case, or in the report of the referee, when such report supplies the place of a statement, the documents containing the evidence are considered and treated, by this court, as constituting a part of such statement or report. It is otherwise in respect to mere parol testimony, which is never resorted to except for the purpose of explaining some ambiguity found in the statement. The report, in this case, refers to a deed tendered by the plaintiff to the defendant, Power, and we find appended to the Case the copy of a deed from the plaintiff to the defendants, bearing date May 1st, 1854, and marked as "Exhibit D." It may be said

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that the report does not identify the original of this paper as the deed which was tendered; but this objection ought not, I think, to prevail. From the contents of the deed itself: from its being marked as an exhibit; and from there being no other deed in the printed Case, it is plainly to be inferred that this is the deed referred to by the referee. Either party might have obtained a correction of the report or of the Case in this respect, and the plaintiff would, no doubt, have done so, if this had not been the true deed. On looking at this document, it is plain that it is not such a deed as the plaintiff was bound by his contract to tender; as it contained merely a covenant for quiet enjoyment, while the contract to the plaintiff undertook to give a deed "with full covenants." The defendant Power, therefore had a right, upon the tender to him of this deed, to refuse to accept it, on account of its insufficiency in this respect. If, however, instead of pointing out this defect, he put his refusal upon other grounds, which would not have been removed by any alteration which could have been made in the deed, neither he nor his co-purchaser can now avail themselves of its insufficiency.

Here, then, arises a question as to the construction to be put upon the report of the referee. That does not even state that Power refused to accept the deed, when tendered. Such a refusal, however, is plainly to be inferred from the tenor of the report; but as to the grounds upon which he placed that refusal, the report is entirely silent. We are left, therefore, to the legal presumptions which arise under the rules heretofore adopted for the construction of referees' reports and statements of facts presented to this court upon appeal. Such reports and statements are not construed with the strictness which was applied, at common-law, to special verdicts. Error on the part of the court below, will not be presumed, but must be made clearly to appear. Hence it is incumbent upon the appellant to take care so to present the facts upon which the case depends, as to show affirmatively that an error has been committed. This court will presume nothing in favor of the party alleging the error; but if compelled, through the imperfection of the state-

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ment of facts, to resort to presumptions at all, will adopt such only as will sustain the judgment. The report, in this case, therefore, being silent as to the grounds upon which the defendant Power refused to accept the deed tendered to him by the plaintiff, we cannot presume that he pointed out the defect in the deed, and based his refusal upon such defect. On the contrary, as we presume the judgment to be right, until the contrary is made distinctly to appear, where, as in this case, there is an evident omission of important facts in the statement or report, we must presume these facts to have been such as would warrant the judgment rendered. It follows, from this, that the judgment cannot be reversed for the insufficiency of the deed.

There is no foundation for the position that the note was void, as being without consideration. It was given for a portion of the sum of \$1,500, to be paid upon the execution of the deed. It had the same consideration as the residue of that sum, and whether it was received in satisfaction *pro tanto* of the payment to be made on the 1st of May, 1854, or merely as an additional security, is of no importance. In either case an action may be maintained upon it under any circumstances which would support an action for the residue of the \$1,500. The judgment must be affirmed.

All the judges concurring,

Judgment affirmed.

21	552
149	144

21	552
151	489

21	552
160	85

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Upon the sale of a chattel by the manufacturer, a warranty is implied that the article sold is free from any latent defect growing out of the process of manufacture.

When, however, there is a latent defect in the materials employed, the manufacturer is liable, as upon implied warranty, only where it proved, or is to be presumed, that he knew of the defect.

It seems that the theory of the common law in respect to implied warranties, rests upon the deceit of the vendor in not disclosing defects of which the probability of his knowledge is so great that its existence is presumed.

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Where the knowledge of the vendor can be proved by direct evidence, his responsibility rests on the ground of fraud.

The difference between the two cases is, that in the one the *scienter* is actually proved, in the other it is presumed.

The reasons of agreement and of diversity between the common law and the civil law in this respect, stated by SELDEN, J.

APPEAL from the Supreme Court. The complaint was upon a promissory note for \$467.88, payable to the plaintiffs, at the Washington County Bank, five months from date.

The defendant, in his answer, alleged that, in 1855, he purchased of the plaintiffs a quantity of circular saws, for the purchase price of which the note set forth in the complaint was given; that, at the time of the purchase, the plaintiffs "warranted said saws to be good saws, and of good quality," and he averred that the saws were "not good saws, or of good quality," and that said saws were "of no value." The reply denied the facts set up in the answer.

Upon the trial, the defendant offered to show these facts: "At and for a long time previous to the purchase in question, the defendant was in the business of manufacturing and vending Page's circular saw-mills, and had in that business had considerable dealings with the plaintiffs. In May, 1855, he ordered of the plaintiffs the saws mentioned in the answer, for the purpose of supplying mills made and vended by him; and communicated the purpose to the plaintiffs. Upon that order, and subsequent thereto, the plaintiffs manufactured the saw in question, and forwarded the same, on the defendant's order, to John Howard & Co., at Port Huron, in Michigan. The consignees tried the saw, in a circular saw-mill made by the defendant and sold to them, and the saw was unsound and worthless by reason of softness, and was returned immediately to the plaintiffs and by them attempted to be retempered, and was again forwarded by the plaintiffs to John Howard & Co., and was found to be utterly worthless by reason of softness, and otherwise defective; and the same was then returned to the defendant."

This offer was objected to, and rejected by the judge, on the ground that the defendant, under the answer, "could not prove

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facts to establish an *implied* guaranty ; that such defence must be specially pleaded." To this decision the counsel for the defendant excepted. The judge subsequently modified this ruling, and decided to receive the evidence offered, except in so far as it was proposed to prove that the saw was manufactured by the plaintiffs for the express use of the defendant's mills. Evidence was thereupon given, tending to show that one of the saws manufactured by the plaintiffs and sold by them to the defendant, and for which the note in suit was given, through defective material, or want of being properly tempered, was so soft as to be entirely useless. At the conclusion of the case, the defendant's counsel insisted that the cause should be submitted to the jury upon this evidence ; but the judge refused so to submit it, and directed the jury to find a verdict for the plaintiffs ; to which direction and request the defendant's counsel excepted.

The jury found a verdict, upon which judgment was entered for the plaintiff ; and upon appeal this judgment was affirmed at general term in the fourth district. The defendant appealed to this court, where the cause was submitted on printed arguments.

Lyman H. Northup, for the appellant.

U. G. Paris, for the respondents.

SELDEN, J. If, to sustain the defence in this case, it was necessary to show that the plaintiffs had agreed to manufacture these saws for a specific purpose, and that when tried one or more of them proved not to be adapted to or useful for that purpose, then the rulings of the judge upon the trial may have been right. Such a contract would be entirely different from an ordinary sale, with a general warranty of quality, and would require to be specially stated. But, on the other hand, if upon every sale of a manufactured article by the manufacturer himself, there is an implied warranty that the article sold is free from any latent defect growing out of the process of manufac

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ture, then the cause should have been submitted to the jury upon the evidence given. It is not necessary, in pleading, where a party relies upon a mere general warranty of the quality of goods sold, to state whether the warranty is express or implied. A general averment that the vendor warranted the articles to be of a good quality, is sufficient. Proof of a warranty of either kind will support the averment. In the view I take of this case, therefore, it is only necessary to consider whether, upon a sale by a manufacturer, of articles manufactured by himself, he impliedly undertakes that such articles are of fair quality, and have no secret defect arising out of the manner in which they were manufactured.

It may not be possible to reconcile all the decisions upon the subject of implied warranties upon the sale of goods; but if we keep steadily in view the principle which lies at the basis of all such cases, we shall find that much of the apparent conflict will disappear. It is a universal doctrine, founded upon the plainest principles of natural justice, that, whenever the article sold has some latent defect which is known to the seller, but not to the purchaser, the former is liable for this defect, if he fails to disclose his knowledge on the subject at the time of the sale. In all such cases, where the knowledge of the vendor is proved by direct evidence, his responsibility rests upon the ground of fraud. But there are cases in which the probability of knowledge on the part of the vendor is so strong, that the courts will presume its existence without proof; and in these cases, the vendor is held responsible upon an implied warranty. The only difference between these two classes of cases is, that in one the *scienter* is actually proved, in the other it is presumed.

It is obvious that the vendor of goods would be very likely to know whether he has a title to the goods he sells. He knows the source from which such title was obtained, and has, therefore, means of judging of its validity which the purchaser cannot be supposed to have. Hence it is the doctrine, both of the civil and the common law, that every vendor impliedly warrants that he has title to what he assumes to sell.

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Some slight doubt has been supposed to be thrown upon this doctrine, in England, by the remarks of PARKE, B., in the case of *Morley v. Attenborough* (3 Exch., 500). It is, however, too well settled, both in England and in this country, to be overthrown or shaken by the *obiter dicta* of a single judge. My object is, not to establish this doctrine, which admits of no doubt, but simply to show that it rests upon the foundation here suggested, viz., the presumed superior knowledge of the vendor in regard to his title. The case of *Morley v. Attenborough* itself tends, in my view, to confirm this position. It arose upon a sale, by a pawnbroker, of a harp pledged with him as security for a debt. The sale was made through auctioneers, and a general catalogue was furnished to the bidders, which "stated on the title page that the goods for sale consisted of a collection of forfeited property." The court held, that there was no implied warranty of title in that case. There was, perhaps, good reason why this case should be considered an exception to the general rule. The pawnbroker could not justly be presumed to have any special knowledge in regard to the ownership of the articles pledged. The probability was, that he had received them upon the faith of the pledgor's possession alone, and the purchaser was, in this respect, upon an equal footing with himself.

There are other exceptions to the general rule, which have the same tendency. The case of judicial sales is one. There is no ground for presuming that the officer of the law has any peculiar knowledge on the subject of the title to the property he exposes to sale. No doubt both the pawnbroker and the officer, if shown to have knowledge which they conceal, would be liable for fraud; or, if they could justly be presumed to have such knowledge, would be liable upon an implied warranty. It was expressly held, in the case of *Peto v. Blades* (5 Taun., 657), that the law raises an implied promise on the part of a sheriff, who sells goods taken in execution, that he does not know that he is destitute of title to the goods.

A very ancient and leading case on the subject of implied warranty of title, viz., *Cross v. Gardner* (Carth., 90), shows the

ground of liability to be that here suggested. There, the plaintiff sought to recover against the defendant for selling a pair of oxen as his, when they in truth belonged to another. It was objected that the declaration neither stated that the defendant deceitfully sold the oxen, nor that he knew them to be the property of another person. But the court held the defendant liable, because the plaintiff had no means of knowing to whom the property belonged but only by the possession. This plainly implies that the defendant had better means of knowledge; and upon this presumption, the court evidently proceeded. That this was the foundation of the decision, appears also from another report of the same case (1 Shower, 68), where the ground taken was, that, "if a man, having possession of goods, sell them as his own, an action lies for the *deceit*." Now, deceit implies knowledge, and as no knowledge was proved, it must have been presumed.

In an older case still, viz., *Dale's case* (Cro. Eliz., 44), the court decided, by two judges against one, that the action would not lie, because there was no allegation, or proof, that the defendant knew of the defect in his title. But, to use the language of Croke, "*ANDERSON contra*, for it shall be intended that he that sold had knowledge whether they were his goods or not." The ground here taken by the dissenting judge, that every vendor is presumed to know whether he has title to the things he sells, is precisely that upon which the subsequent cases have proceeded, and one which affords a solid basis for the doctrine of implied warranty of title.

It is equally clear, that implied warranties in respect to quality, wherever they are held to arise, rest upon a presumption, in the particular case, that the vendor knew of the defect. It is easy to see, that, in respect to all that class of personal chattels which do not enter extensively into the business and trade of a people, and which do not pass rapidly from hand to hand, such as horses, cattle, furniture, and the like, the vendor who, in most cases, would have had the article for some time in possession and use, would be very likely to know whether it was defective, and a presumption of knowledge would, in

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such cases, as a general rule, be both reasonable and safe. On the other hand, with regard to those goods which are the subject of general traffic, and are habitually purchased, not for use, but to be sold again, no such presumption could fairly arise. This distinction may serve to account, in some degree, for the difference between the civil and the common law rule upon the subject of latent defects in articles sold. The rule of the civil law, viz., *caveat venditor*, was adopted at an early period, and in reference, as it would seem, rather to those articles which are of general and ordinary use, than to such as enter extensively into the commerce of the country; while that of the common law, viz., *caveat emptor*, originating in a commercial age, and among a highly commercial people, naturally took the form best calculated to promote the freedom of trade. No doubt the common law rule is, upon the whole, wisest and best adapted to an advanced state of society; and yet there is a large class of cases in which that of the civil law would serve to prevent a multitude of frauds. Take, for instance, the article of horses. Few would deny that, as to them, it would be more conducive to justice if the vendor were, in all cases, held to warrant against secret defects. But, as it would be impracticable to discriminate among the infinite variety of articles which are the subjects of sale, the common law applies the maxim *caveat emptor*, as a general rule, to all cases.

—It has been frequently, but, as I apprehend, inaccurately said, that under the civil law a warranty is implied from the payment of a "sound price" for the article sold. Although paying a "sound price" may prove that the purchaser was not, it does not prove that the vendor was cognizant of any defect. It can, therefore, have no tendency to show which of the two parties ought to bear the loss. Where, however, the price paid is less than the value of the article, supposing it to be sound, this shows that the purchaser was apprised of the defect, and that the parties contracted with reference to it. In such cases, therefore, no warranty arises. It is in this aspect alone that the price paid becomes of importance. But because the want of a "sound price" would thus prevent a warranty, it has been

illogically inferred that the payment of a "sound price" was the foundation of the warranty. The truth is, that the civil law raises the warranty, because it presumes knowledge on the part of the vendor; and the want of a "sound price" prevents a warranty, because it proves equal knowledge on the part of the vendee.

The theory of the civil and of the common law, in respect to these implied warranties, is entirely different. The civil law holds, that the warranty enters into and forms an integral part of the contract of sale itself, as will be seen by referring to Pothier's definition of a sale, and his statement of the obligation of the vendor to warrant against latent defects, which he deduces directly from that definition. The definition he gives seems to be somewhat strained for the purpose of embracing that obligation. (See Pothier on Cont. of Sale, Prelim. Art. and Part II, chap. 1, § 4.)

But the common law, with, as I conceive, better logic, derives the obligation from the general doctrine which holds vendors responsible for every species of deception. That this is the true source of this warranty at the common law, will be rendered apparent by reference to three early cases, two of which have been already referred to; viz.: *Dale's case* (Cro. Eliz., 44); *Furnis v. Leicester* (Cro. Jac., 474); and *Cross v. Gardner* (Carth., 90; S. C., 1 Show., 68). These cases show by what gradations a strong principle of justice overcame at length the technical rules of the common law, and forced the courts to sustain an action for a deceit without any averment or actual proof of willful deception.

It is possible to read, even in the meagre record we have of these three cases, the mental operations of the pleaders, at that remote period, in framing the respective declarations. They were all experimental cases, and probably enlisted the highest legal talent. The declaration in *Cross v. Gardner*, as we know, was drawn by Mr. Justice GOULD of the King's Bench. This we learn from himself, in *Medina v. Stoughton* (Lord Ray, 593). The object of the pleader in each case, evidently was to avoid the necessity of alleging a *scienter*, of which he has no extrin-

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sic proof. In *Dale's case*, there was no averment, direct or indirect, on the subject of knowledge, and the experiment failed; the pleader having taken too great a stride to begin with, but carrying along with him, nevertheless, one-third of the court. In *Furnis v. Leicester*, the word "deceitfully," which implied knowledge, was ventured upon, relying upon the presumption of knowledge to support it; and this experiment succeeded. In *Cross v. Gardner*, another step was taken, and a *colloquium* and averment of possession in the plaintiff were resorted to, instead of any allegation of knowledge. In this, also, the pleader was successful.

These are the cases, especially the last, which established, in the English courts, the doctrine of implied warranty of title; and my object in referring to them is to sustain the position I take, that the rule was originally based upon the presumption that a vendor knows whether or not he has title to the things which he sells. That this was so, is manifest from the kind of declaration used in all these cases, viz.: case for a deceit. Precisely when the form of action was changed, from case to *assumpsit*, does not appear; but it certainly was not until after the time of Blackstone, because he says: "In contracts likewise for sales, it is constantly understood that the seller undertakes that the commodity he sells is his own, and if it proves otherwise, an action on the case lies against him to exact damages for this deceit." (3 Bl. Com., 165.) It is plain, therefore, that the courts proceeded in these cases upon the ground of presumptive knowledge on the part of the vendor of his want of title.

It has already been shown, to some extent, that implied warranties as to quality, are based, when they exist at all, upon the same assumption. But this will further appear from some of the exceptions to the common law rule of *caveat emptor*. One of these exceptions, which has been generally recognized, is, that upon the sale of provisions, which are purchased, not for the purpose of resale, but to be consumed by the purchaser, there is an implied warranty that such provisions are sound and wholesome. There are two cases in our own courts which show the foundation of this exception. The first is that of

Van Bracklin v. Fonda (12 John., 468), which was an action to recover damages for selling a quantity of beef as "good and sound," which proved "bad and unwholesome." There was in that case some evidence that the defendant knew the animal to be diseased before it was slaughtered; but the court, in giving judgment, say that "in the sale of provisions for domestic use, the vendor is bound to know that they are sound and wholesome, at his peril." Although what the court here says is that the vendor is bound to know the condition of what he sells, yet the subsequent case of *Moses v. Mead* (1 Denio, 378), which was more elaborately considered, shows clearly that the doctrine rests upon a presumption of knowledge on his part. The sale in that case was of 194 barrels of mess beef, which proved to be tainted; and the action was assumpsit founded upon an implied warranty of soundness. The beef was bought, not for immediate consumption, but by merchants, for the purpose of being resold. Mr. Mann, who argued for the defendant, did not dispute the general rule, but relied upon the fact that the purchase was not for consumption. The pith of his argument was in this sentence: "Where the sale is by wholesale, the vendor has no more opportunity of knowing their quality (the quality of the provisions sold) than the purchaser." In giving judgment for the defendant, the court proceeded upon this ground, as is evident from the following language of BRONSON, Ch. J. After referring with approbation to the case of *Van Brocklin v. Fonda*, he says: "But there is a very plain distinction between selling provisions for domestic use and selling them as articles of merchandise, which the buyer does not intend to consume but to sell again. Such sales are usually made in large quantities, and with less of opportunity to know the actual condition of the goods, than when they are sold by retail." The implied warranty depends, therefore, in these cases, as in all others, upon the question whether there is reason to impute to the vendor a knowledge of the defects, if any exist.

Another exception to the general rule, which has been recognized in several cases, but with some hesitation and uncertainty, is, that a manufacturer, who sells goods of his own

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manufacture, impliedly warrants that they are free from any latent defect growing out of the process of manufacture. In regard to the justness of this exception, it would seem, aside from authority, scarcely possible to doubt. If the vendor can be proved to have had knowledge of the defect, and failed to disclose it, all agree he is liable. Is it not reasonable to presume that he who made a thing which has a defect arising solely from the manner in which it is made, is cognizant of that defect? Where the vendor has manufactured the article with his own hands, the inference of knowledge would, plainly, in many cases, be strong enough to charge him even in an action for fraud. But if the manufacturing is done by agents, the general principles of law would hold the principal responsible for those whom he employs. Wherever the vendor, therefore, has himself manufactured the article sold, or procured it to be done by others, if honesty and fair dealing are ever to be enforced by law, a warranty should be implied. The doubts which have been expressed in one or two cases in this State, upon this subject, could, I think, never have arisen, if the courts had kept steadily in view the principles upon which implied warranties rest. This would also have prevented the confusion which pervades the early English cases on the subject of exceptions to the maxim *caveat emptor*. The rule that upon executory contracts for the delivery of some indeterminate thing at a future day, there is an implied warranty that the article shall be of a fair quality and merchantable; the supposed rule that upon the sale of a thing for a particular purpose, there is an implied warranty that the thing shall be fit and suitable for that purpose, and the like rule that upon the sale of goods by sample, the vendor warrants that the goods shall be equal to the sample, have all been treated as exceptions to that maxim.

The first of these rules may, perhaps, be regarded as in some sense an exception, although the case is not one to which the maxim *caveat emptor* could, by possibility, be supposed to apply. But the other two can hardly be considered as exceptions at all. When a person, desirous to obtain an article for a particular purpose, but not being himself skilled in respect to such arti-

cles, applies to one professing to be acquainted with the subject, or who, by his occupation, holds himself out to the world as understanding it, and the latter furnishes what he alleges to be suitable, it is plainly to be inferred that both parties understand the purchase to be made upon the judgment and responsibility of the seller. In view of some such case, one or more of the English judges, at an early day, laid down the broad proposition, that, upon the sale of goods for a specified purpose, the law raised an implied warranty, that the goods sold were suitable for that purpose. In *Bluett v. Osborne* (1 Stark., 884), Lord ELLENBOROUGH said: "A person who sells, impliedly warrants that the thing sold shall answer the purpose for which it is sold." Lord TENTERDEN used similar language in *Gray v. Cox* (4 Barn. & Cress., 108). BEST, Ch. J., reiterated the doctrine in *Jones v. Bright* (5 Bing., 533).

But it is obvious that notwithstanding the goods are sold for a particular use, if the purchaser himself understands what he wants, and selects such goods as he deems adapted to the intended use, there is no warranty. There can, therefore, be no such general rule as that referred to; but whether there is a warranty or not, must depend upon the circumstances of each particular case. This subject has been placed upon its true basis by two later English cases, viz.: *Chanter v. Hopkins* (4 Mees. & Wels., 399), and *Brown v. Edgington* (2 Man. & Gr., 279). In the last of these cases, TINDAL, Ch. J., says: "It appears to me to be a distinction well founded, both in reason and on authority, that if a party purchases an article upon his own judgment, he cannot afterwards hold the vendor responsible on the ground that the article turns out to be unfit for the purpose for which it was required; but if he relies upon the judgment of the seller, and informs him of the use to which the article is to be applied, it seems to me that transaction carries with it an implied warranty, that the thing furnished shall be fit and proper for the use for which it was designed."

This extract shows that these are not cases of implied warranty in the ordinary sense of these terms. The question is one of fact as to the actual contract between the parties. It is,

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on whose judgment and responsibility was the purchase really made? Implied warranties do not rest upon any supposed agreement in fact. They are obligations which the law raises upon principles foreign to the actual contract; principles which are strictly analogous to those upon which vendors are held liable for fraud. It is for the sake of convenience, merely, that this obligation is permitted to be enforced under the form of a contract. However refined this distinction may appear, its non-observance has led to much of the confusion to be found in the cases on this subject.

The same may be said in regard to the doctrine that an implied warranty arises upon every sale by sample; a doctrine, which, with the most obvious propriety, has been limited by the recent cases in this State (unless the goods are so situated that they cannot be examined by the buyer) to those cases where the circumstances warrant the inference that the seller actually undertook that the bulk of the commodity sold, corresponded with the sample. (*Waring v. Mason*, 18 Wend., 425; *Hargous v. Stone*, 1 Seld., 73.) In view of the principle settled by these cases, it is equally clear that warranties of this sort, are not strictly implied warranties. They are to be made out as a matter of fact, or they do not exist at all. To infer an actual warranty from the circumstances proved, is one thing; to impute a warranty without proof, is another and different thing, and unless we distinguish between the two, we unavoidably get into confusion.

I will refer to a single case by way of illustration, viz.: *Jones v. Bright* (5 Bing., 533), a leading case and one frequently cited. The facts were that the plaintiff purchased from the warehouse of the defendant, who was himself the manufacturer, copper for the sheathing of a ship. The defendant, who was informed of the purpose for which the copper was wanted, said: "I will serve you well." The copper, in consequence of some defect, lasted only four months, instead of four years, the usual time. *BEST*, Ch. J., before whom the cause was tried, left it to the jury to determine whether the decay in the copper was occasioned by intrinsic defect, or external accident; and, if it

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arose from intrinsic defect, whether such defect was caused by the process of manufacture. The jury found that the decay was occasioned by some intrinsic defect, but that there was no satisfactory evidence as to the cause of that defect. The court held the defendant liable. But there is no little difficulty in ascertaining the precise ground upon which the decision was placed. It is evident that the Chief Justice, when he tried the cause, expected to dispose of it on the ground that the defect in the copper grew out of the process of manufacture; for he says in his opinion upon the motion for a new trial: "I declined expressing an opinion at *nisi prius*, but I expected the jury would have found that the article was not properly manufactured, for the testimony of the scientific witnesses was very clear." Still he does not seem willing, entirely to abandon this ground, notwithstanding the verdict was against it, for he goes on to remark: "At all events, the warranty given by them (the defendants) is not satisfied, because the jury found that there is an intrinsic defect in an article *manufactured by them*."

But the Chief Justice seems to have been driven by the verdict, to seek for some other ground upon which to rest the case. He argues, therefore, to show that the words "I will serve you well," constitute an express warranty. He then adds: "But I wish to put the case on a broad principle. If a man sells an article, he thereby warrants that *it is merchantable*, that it is fit for some purpose. * * * If he sells it for a particular purpose, he thereby warrants it fit for that purpose." Mr. Justice BURROUGH seems to me to have taken the most sensible view of the case. He says: "I consider this as more a question of *fact* than of law. The question is whether the contract was proved as laid. It was so proved; and after Fisher had introduced the parties, and stated the purpose for which the plaintiff wanted the copper, the defendants warranted the article by undertaking to serve the plaintiff well."

This case has been cited, indiscriminately, to prove that upon the sale of manufactured articles, by the manufacturer himself, there is an implied warranty against defects arising from the process of manufacture; that goods sold for a particular pur-

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pose are warranted fit for that purpose, and even that there is an implied warranty in all cases of sale, that the goods sold are fit for some purpose.

The case, I think, was properly decided, on the ground upon which it was placed by BURROUGH, J. It was this case, more than any other, which has served to create, in the minds of some of our judges, so strong a feeling against exceptions to the maxim *caveat emptor*, that they have been disposed to reject all such exceptions without discrimination. (*Wright v. Hart*, 18 Wend., 449; *Hargous v. Stone*, 1 Seld., 73.) But if we look at what the English courts have really decided, instead of what some of the judges have loosely said, we should, I think, find less occasion for deprecating their tendency in this respect, towards the doctrines of the civil law, than has been supposed.

But for this hostility to all implied warranties, as to quality, it never could have been doubted that where one sells an article of his own manufacture, which has a defect produced by the manufacturing process itself, the seller must be presumed to have had knowledge of such defect, and must be holden, therefore, upon the most obvious principles of equity and justice, unless he informs the purchaser of the defect, to indemnify him against it. In such cases, if the price paid is entirely below that of a sound article, a presumption would, no doubt, arise, as under the civil law, that the purchaser was apprised of the defect.

In the present case, a portion of the alleged defect in the saw would seem to have arisen from the unsuitableness of the material of which it was made. The rule on the subject, I hold to be this: The vendor is liable, in such cases, for any latent defect, not disclosed to the purchaser, arising from the manner in which the article was manufactured; and if he, knowingly, uses improper materials, he is liable for that also; but not for any latent defect in the material which he is not shown and cannot be presumed to have known.

The judgment should be reversed, and there should be a new trial, with costs to abide the event.

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All the judges concurred; COMSTOCK, Ch. J., and DAVIES, J., however, only in the conclusion, reserving their judgment as to some of the propositions in the opinion.

Judgment reversed and new trial ordered.

MANNING v. TYLER *et al.*

The precision required in stating the facts essential to make out the defence of usury has not been relaxed by the Code.

Where the answer avers usury in general terms, without stating the *quantum*, or a corrupt agreement for its payment, the plaintiff is entitled to judgment for its frivolousness, and need not move to make it more definite and certain.

APPEAL from the Supreme Court. The defendants were sued on a promissory note for \$300—Raynor as maker, and Tyler as indorser. The answer purported to set up the defence of usury in this manner: It stated that "about six months" prior to the date of the note in suit, Raynor made a note for the same amount payable in three months: procured Tyler to indorse it for his accommodation, "which said note was got up for the purpose of enabling said Raynor to raise the money thereon;" that Raynor "thereupon applied to the plaintiff to loan him the money on said note for said three months, and the said plaintiff did thereupon loan Raynor the said money on said note, but at a greater rate of interest than at the rate of seven per cent per annum; that said note was renewed from time to time [stating in what manner], and that at each of said renewals the plaintiff received, and the defendants agreed to pay, a greater rate of interest than at the rate of seven per cent per annum; that all these transactions were at the city of Syracuse, in this State; wherefore the defendants insist that the note mentioned in the complaint [which the answer shows to be the last of the series] is usurious and void."

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The plaintiff applied to a justice of the court for judgment on account of the frivolousness of the answer, pursuant to section 247 of the Code; and judgment was given accordingly. The appeal was from a judgment at general term affirming the first mentioned judgment.

Amasa J. Parker, for the appellants.

John K. Porter, for the respondent.

BACON, J. That the answer in this case is bad, within all the rules of pleading heretofore recognized in the courts, cannot, I think, be questioned. It consists, in effect, of nothing more than a general averment that the note on which the suit is brought is void for usury. It does not aver what the usurious agreement was: between whom it was made: the quantum of usurious interest that was agreed upon and received, nor that the agreement was intentionally usurious and corrupt. The old rule of pleading required all this particularity. Thus, in *Vroom v. Ditmas* (4 Paige, 526), the Chancellor, speaking of the manner in which usury must be set forth in a pleading, says "the defence must be distinctly set up in the plea or answer, and the terms of the usurious agreement, and the quantum of the usurious interest or premium must be distinctly and correctly set up." See also, to the same effect, *New Orleans Gas Company v. Dudley* (8 Paige, 452); *Curtis v. Masten* (11 *Id.*, 15), and numerous other cases. In the case of the *New Orleans Gas Company v. Dudley*, the Chancellor, speaking of an answer thus bald and deficient in these essential elements, says that such a pleading would certainly be considered bad both in form and substance if pleaded as a defence to a suit upon a bond or evidence of debt in a court of law.

Under our present system, which requires the facts constituting a defence to be plainly and concisely set forth, this rule cannot be deemed to be relaxed; and so are the cases, *Fay v. Grimstead* (10 Barb. S. C. R., 321-9); *Gould v. Horner* (12 *Id.* 601). The answer, then, is bad in substance for the

want of these essential allegations, and being thus fatally defective, the defendant having presented to the court below no affidavit of merits, nor made any application to amend the pleading so as to present a defence, the judgment here should be final against him.

Everything stated in this answer may be true, and yet no usury whatever have existed in the transaction; since there may be many cases where more than seven per cent is actually received upon a loan, and yet the transaction be entirely uninfected with usury; and the law will never presume a corrupt and usurious, or, indeed, any other unlawful agreement from a state of facts that is equally consistent with a lawful purpose.

The case of *Catlin v. Gunter* (1 Kern., 368), in no respect aids the defendant. That case turned entirely on the question of variance. The answer set forth the defence of usury in a full and unmistakable manner, and could not be objected to as a pleading in any form. The usury proved on the trial differed in several particulars from that alleged, but not in its entire scope and meaning; and the court consequently held, under the provision of the Code applicable to variances and the power of amendment, that the variance, it not having been alleged that the party was misled by it, should have been deemed immaterial. It is conceded in the opinion of the court in that case, that if the answer had been, in general terms, that the note was, at its inception, negotiated upon a usurious consideration, it would have been bad for its generality. That is the whole scope of the answer in this case.

It is insisted that the remedy of the plaintiff was to move, under section 160 of the Code, to make the answer more certain and definite. It is very true that resort might have been had to this section if the plaintiff had elected to compel the defendant to put in an issuable answer; but that is only one of the remedies which the law affords. If the answer is so bad that it presents no defence at all, then another proceeding is provided by which it can be disposed of in a summary manner, and the delay which the defendant obviously seeks (and which, in this

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case, he has succeeded in obtaining), by such a naked pleading be defeated. (Code, § 247; *People v. Macumber*, 18 N. Y., 315.)

Such was the relief sought by the plaintiff in this case, and the court properly determined, upon a view of the pleadings, that it presented no defence, and gave judgment accordingly. The judgment should be affirmed.

SELDEN, DAVIES, WRIGHT and WELLES, Js., concurred.

DENIO, J. (Dissenting.) It is not now a question whether the answer was frivolous, but whether it set forth a defence to the action, which was sufficient in substance. The proceeding by which the plaintiff obtained judgment was analogous to the former practice by which a party was permitted to move for judgment on account of the alleged frivolousness of a demurrer, or bill of exceptions. If the point was entirely plain, judgment was given at once without the delay which would attend its being brought up in its regular course among the serious litigations pending in the court; but if it presented matter for argument the motion was denied, and the case was brought forward in the usual manner. On the review of the judgment the question was, whether it was erroneous in law or otherwise, and not whether the point was more or less clear; nor whether it was right to dispose of it summarily. The case allows such a motion to be made on an answer or reply alleged to be frivolous, and in such cases the allegation of frivolousness is in the nature of a general demurrer. I have thought it necessary to make this explanation because it has been argued that whatever the merits of the answer might appear to be upon a full examination, it was not so plainly bad that it could be disposed of upon a motion grounded on alleged frivolousness.

It cannot be denied but that the answer lacks the degree of particularity which has always been considered necessary in setting up a defence of usury. The cases are numerous and decisive which hold that the terms of the usurious contract should be stated so that it shall appear what rate or amount

of interest was taken or secured, and on what sum and for what time; in order that the other party may be informed of the case he is required to meet. But it is obvious that the case may be such that the plaintiff would not stand in need of this information. He might know, upon the defence being interposed, precisely what the defendants' pretence would be, and might elect to go to trial without further delay. If he should elect to do so, no wrong would be done to either party. But he has a right to require the particulars to be stated; and the question is, in what form this requirement is to be asserted.

Formerly, if a plea was defective for want of particularity, but a substantial defence was presented, the objection must have been made by special demurrer. This I think was the case where usury was pleaded in general terms, without setting out the particulars of the usurious contract. *Hinton v. Roffey* (3 Mod., 35; S. C., 2 Shower, 329), was decided before the statute. (4 and 5 Anne, ch. 16), requiring defects of form to be specially stated in the demurrer. To debt on bond, the defendant pleaded that it was corruptly agreed that interest should be paid for it above the rate of six per cent. The plaintiff demurred and judgment was given in his favor; the court saying, according to the report in Shower, that the corrupt agreement ought to be specially and particularly set forth, and the *quantum* of interest; otherwise the plaintiff can never tell what to answer. In *Hill v. Montague* (2 Maule & Selw., 377), which was also debt on a bond, the plea was precisely the same as in the case reported in Modern and in Shower; and the plaintiff's demurrer assigned for cause that it did not allege or specify any of the particulars of the alleged usurious contract; nor the time of such forbearance; nor the sum forborne; nor the sum to be paid for such forbearance. The court held the plea bad; repeating the remark made by the court in *Hinton v. Roffey*, and adding, "The party against whom it is pleaded may be aware of the contract, but he cannot know in what particular it is meant to be assailed, or wherein the other side imputes vice to it." In treating of the degree of certainty required in a plea in bar, Chitty lays it down that a general plea of usury, not stating

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the particulars of the contract or the sum to be forborne, is bad on special demurrer, and he refers to this case in Maule and Selwin (1 Chit. Pl., 527). And Saunders lays down the rule thus: "The chief requisite of a plea of usury is, that it should state the corrupt contract and the usurious interest with the greatest precision and particularity, to show how the usury was committed, and that the party may know what to answer; and if it be too generally stated it will be held bad on special demurrer. (Vol. 2, p. 895.)

In *New Orleans Gas Company v. Dudley* (8 Paige, 452), the allegation of usury in an equity suit to foreclose a mortgage was, that there was usury in it either by a pretended sale of property at more than its value, or in some other way. The Chancellor held the allegation insufficient, and said it would be defective in a court of law both in form and substance. An alternative allegation of a material fact was always bad. (Stephens on Pl., 387.) Independently of this *dictum*, which I think does not touch the case, I have not found any authority in which it is intimated that an allegation of usury in the contract would be bad on general demurrer for lack of stating the particulars of the alleged usurious contract. In the case under consideration, the contract sued on, which was a promissory note, is set forth in the complaint. The answer alleges that the note was the last one of a series of notes between the same parties; the first one having been given on a loan of money, by the maker of the plaintiff; at a higher rate of interest than seven per cent, and that the other notes were successively given in renewal of that one, and that therefore the note sued on is void for usury. If the rate of interest had been stated—as by adding, "to wit, at the rate of ten per cent per annum"—I suppose the answer would have been unexceptionable; and on the trial a variance as to the amount of interest would not have been material, unless it had been proved that the plaintiff was misled. (*Catlin v. Gunter*, 1 Kern., 368.) If I am right thus far, a good defence was stated in the answer; but it was defectively stated, and that defect under the former rules was required to be pointed out by special demurrer, if the plaintiff would avail himself of it. The Code

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allows a demurrer to an answer, which embodies new matter, where upon its face it does not constitute a defence. (§ 153.) It no where recognizes a demurrer to an answer for defect of form or want of particularity; and the theory upon which that system was formed was, that parties were not to be prejudiced by mere lack of form. But it moreover makes a special provision for the case of deficiencies of the precise character of those which exist in this answer; for it declares that where the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defence is not apparent, the court may require the pleading to be made definite and certain by amendment. (§ 160.) It has been shown by a reference to the judgments in *Hinton v. Roffey*, and *Hill v. Montagu*, that the reason for requiring the particulars of the usurious contract to be stated is, that it might be apparent what the precise nature of the charge of usury was. I am, therefore, of opinion that the plaintiff's remedy, for the want of particularity in the answer, was by a motion under this section of the Code. That remedy is in its nature exclusive; for it would be preposterous to hold that the plaintiff might apply by motion to have the pleading made more definite, but might equally, at his election, treat it as disclosing no defence whatever on its face, and apply for a peremptory judgment. If he could take the latter course he would never make a motion under the 160th section; for all he could desire in any case would be to have judgment in his favor. This court has repeatedly taken that view of the section. (*Wall v. The Buffalo Water Works Co.*, 18 N. Y., 119; *Seeley v. Engell*, 3 Kern., 542; *The People v. Ryder*, 2 *id.*, 438; *Prindle v. Caruthers*, 15 N. Y., 425.) The last of these cases is very much in point. The plaintiff sued on a contract not negotiable, and which was for the payment of an annual sum to one H. C., or his wife, or the longest liver of them. The action was in the name of a third party, who averred in his complaint that the contract was, on a certain day, his property by purchase, without saying from whom or on what consideration or showing in whom the right was vested when the purchase was made: and the case arose on demurrer. The answer which we gave to the

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objection of want of definiteness was that "the remedy for all defects of this nature is by motion under section 16 of the Code to make the faulty pleading more definite and certain." It was added that that proceeding had taken the place of demurrer for want of form. (*Per* JOHNSON, J.)

The result of these views is that the judgment ought to be reversed with costs, with a direction to the Supreme Court to allow the plaintiff to move to correct the answer, or to bring the case to trial upon the present pleadings, at his election and upon such terms as to costs as that court may think fit to impose.

CLERKE, J., concurred in this opinion.

Judgment affirmed.

21	574
154	645

BRIGGS v. DAVIS.

Where there is a valid trust for the sale of land, the party creating the trust and those holding derivative titles under him, have no rights legal or equitable until the purposes of the trust are satisfied.

Their interests are subject to the execution of the trust absolutely; so that a subsequent grantee, from the creator of a trust to sell for the payment of debts, acquires no right to redeem the land.

The decision in this case (20 N. Y., 16) corrected accordingly.

MOTION for a reargument. The points are sufficiently stated in the following opinion.

George N. Titus, for the motion.

David B. Prosser, opposed.

DENIO, J. This is a motion by the appellant for a reargument. The facts in the case and the judgment given at the last September term, are stated in the report in 20 N. Y.,

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p. 16. The appellant's counsel insists that the court fell into an error in fixing the terms upon which a redemption should be allowed. We held that in order to redeem, the appellant, as the representative of the North American Trust and Banking Company, must pay the amount found due the representatives of Joel Dorman; but the defendant maintains that he ought only to be required to pay the amount bid for the premises, and interest. The respondent, though satisfied with the judgment (because the amount to be paid in order to redeem would be more than the value of the land), claims that it was not a case in which a redemption, upon any terms, ought to have been permitted. The judgment of the Supreme Court declared that the plaintiff was entitled to hold the premises discharged of the mortgage to the Trust Company; and the opinion as at first prepared, concluded with a general judgment of affirmance. But on consultation, our attention was drawn to the 61st and 62d sections of the statute of uses and trusts; upon consideration of which it was thought that the Trust Company, under its mortgage, stood in the position of a subsequent incumbrancer; the lien of the administrator of Dorman being regarded in the light of a prior lien. Then, inasmuch as the Trust Company had not been made a party to the suit, under the judgment on which the sale to the plaintiff was made, it followed, if the analogy were pursued, that the company had not been foreclosed. In that view of the case the plaintiff, by his purchase at the sale under the judgment, became entitled, as it was held, as against the Trust Company, to the rights of Dorman's representative, and was liable to be redeemed from upon payment of the debt, according to the case of *Vroom v. Dittmas* (4 Paige, 426). The opinion was changed to accommodate it to that view, and judgment was given accordingly. The circumstance that there were other lands of Cornelius Masten besides these mortgaged premises, which were embraced in his assignment for the benefit of creditors, and in the reassignment by the trustees, one parcel of which did not certainly appear to be subject to any subsequent lien under Masten, was overlooked. It is now urged by the counsel for the receiver of the Trust Company,

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that this other piece of land should be first subjected to the lien of the representatives of Dorman, and that the terms upon which the redemption was allowed, are inequitable. It is also argued that the plaintiff cannot be considered as clothed with the rights of Dorman's administrator because he only paid a small part of the amount of the debt, while another purchaser of another parcel of land paid another portion of it, and the bulk of the debt still remains unpaid.

On further reflection, I am of opinion that we proceeded upon a doctrine which is not applicable to the case. The provisions of the Revised Statutes which are supposed to bear upon the question are the following:

"§ 60. Every express trust, valid as such in its creation, except as herein otherwise provided, shall vest the whole estate in the trustees in law and in equity subject only to the execution of the trust. The persons for whose benefit the trust is created shall take no estate or interest in the lands, but may enforce the performance of the trust in equity."

"§ 61. The preceding section shall not prevent any person creating a trust, from declaring to whom the lands to which the trust relates shall belong in the event of the failure or termination of the trust; *nor shall it prevent him from granting or devising such lands subject to the execution of the trust.* Every such grantee or devisee shall have a legal estate in the lands as against all persons except the trustees or those lawfully claiming under them."

"§ 62. Where an express trust is created, every estate and interest not embraced in the trust and not otherwise disposed of, shall remain in, or revert to the person creating the trust, or his heirs, as a legal estate." (1 R. S., 729.)

The whole estate in these lands was embraced in the trust created by Masten, so that the 62d section, which provides for cases where a term, or an estate for life is the subject of a trust created by the owner of the fee, has no application. By the 60th section, the trust vested the whole estate in the trustees, both in law and in equity, except so far as it is qualified by the next succeeding section. The effect of that qualification is

that the grantors of the trust may nevertheless declare to whom the lands shall belong if the trust shall fail, or when it shall expire; and he may grant or devise the lands subject to the execution of the trust. Now the trust authorized the sale of these lands for the purpose of paying the debts of Masten. The rights of the assignor reserved by the 61st section, were subordinate to the estate of the trustees, not only at law but in equity. Though the assignor should convey all his remaining estate and interest to another, immediately after executing the assignment, the grantee would have no estate, legal or equitable, as against the trustees or those holding under them. If this were otherwise, and if the estate of the trustees was regarded as in the nature of a lien, and subsequent conveyances, mortgages or judgments against the assignor, were considered analogous to conveyances of, or liens upon, an equity of redemption, it would follow that the trustees could not convey an irredeemable title to the lands assigned, until they had foreclosed the rights of the subsequent parties. This is not the effect of a valid trust to sell lands. For the purposes of sale in execution of the trust the grantor of the trust and those holding derivative titles under him are entirely disregarded. Their interests are subject to the execution of the trust; not in the sense that a junior mortgage is subject to the prior one, but absolutely. These parties have no rights, legal or equitable, until the purposes of the trust are satisfied. If, therefore, the trustees in this case had performed their duty by making a private sale or a sale at auction of these premises to the plaintiff, the Trust Company could not have complained that they had not been called into court to redeem or be foreclosed.

But instead of executing the trust, they attempted to subvert it by a reconveyance to Masten. This we have held to be void, as an act in contravention of the trust. The statute provides that the parties for whose benefit a trust is created may enforce its performance in equity. (§ 60.) The administrators of Dorman did this, by the suit commenced in the Court of Chancery and which was finally determined in the Supreme Court; and the sale and conveyance made pursuant to the

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judgment in that suit was a substitute for, and precisely equivalent to, a sale and conveyance by the trustees in the execution of the trust.

It follows, from these views, that the right to redeem extended to the receiver, was an advantage which he had no right to claim. The motion for a reargument made on his behalf must therefore be denied. The respondent, should he claim it, will be entitled to a reargument for the purpose of having the judgment changed to a simple affirmance of the judgment of the Supreme Court.

All the judges concurring,

Motion denied.

THE PEOPLE v. DYLL.

The guilt of a prisoner depending upon the credibility of evidence given by an accomplice, it is no error to charge the jury that they might take into consideration the omission of the prisoner to contradict the accomplice upon a statement in respect to which, if false, contradictory evidence was apparently within the prisoner's power.

APPEAL from the Supreme Court. Indictment for arson in firing a barn, tried at the Greene Circuit, where the prisoner was convicted. The judgment having been affirmed at general term in the third district, the defendant appealed to this court.

Lyman Tremain, for the appellant.

J. B. Olney, for the People, respondents.

By the Court—COMSTOCK, Ch. J. The only direct evidence of the prisoner's guilt was given by his accomplice, Griffin. It was a part of his story, that, on the night of the arson, he and

21	578
127	46
21	578
150	353

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his confederates were at the house of William T. Huggins; that they went to bed there at an early hour; that they afterwards got up, went and committed the crime, and then returned to bed in the same house. The defendant produced no evidence to show that he was not at the house of William T. Huggins on that night; and the judge instructed the jury that they might, if they thought proper, take this omission into consideration as a circumstance which corroborated the evidence of Griffin. To this instruction, the defendant excepted. The question was raised, and the exception repeated in various forms, which do not require a particular statement.

On the argument in this court, it has been urged that, inasmuch as no conviction could be had upon the uncorroborated evidence of Griffin, the prisoner was not put on the defensive, and was not bound to contradict, even if he could, any of the circumstances related against him. To this it might be answered, that the witness was not wholly uncorroborated. There was other evidence tending to strengthen his statement in several particulars. But there is no rule of law which prevents a conviction on the testimony of an accomplice alone. The utmost caution should undoubtedly be exercised; but juries are, nevertheless, at liberty to convict on the unsupported testimony of a confederate in the crime. Mr. Greenleaf thus states the rule, and, we think, correctly: "*The degree of credit* which ought to be given to the testimony of an accomplice is a matter exclusively within the province of the jury. It has been sometimes said that they ought not to believe him unless his testimony is corroborated by other evidence; and, without doubt, great caution in weighing such testimony is dictated by prudence and good reason. But there is no such rule of law; it being expressly conceded that the jury may, if they please, act upon the evidence of the accomplice without any confirmation of his statement." (1 Greenl. Ev., § 380.) What the author further says on this point relates to the duty of the judge to give the proper advice to the jury in such cases. (See, also, *The People v. Costello*, 1 Denio, 83; 1 Phillips' Ev., Cowen &

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Hill's ed., 37; 1 Chit. Crim. Law, 604.) Such being the rule, a case was made out for the consideration of the jury, and it follows that more or less importance might well be attached to the omission of the accused to contradict the evidence, where, if it was not true, contradiction was within his power.

But it is also urged that corroborative evidence is, in its nature, affirmative, and that no corroboration could be derived from the mere omission of the prisoner to show that the evidence of the accomplice was untrue in the particular referred to. The People, it is said, must convict upon the strength of their own case. No such proposition as this can be universally maintained. In this case, it would have been an unanswerable impeachment of the evidence of Griffin if the defendant had proved that he was not at the house of William T. Huggins during the night in question. This was a circumstance intimately connected with the story which the accomplice told, and a credible contradiction of it would have overthrown the whole statement. It is, moreover, a fair presumption that contradiction was within his power. Some of the Huggins family might testify, if such was the fact, that the defendant was not there; and he might have proved by others that he was somewhere else. I apprehend that a person accused of firing a barn on a given night, if the accusation be false, can generally show, if it be material, that he and his supposed confederates did not pass the night at a particular house in the neighborhood not his own. At all events, these were considerations for the jury; and if they believed that the defendant had it in his power to contradict this part of Griffin's evidence, if it was false, they might regard his omission to do so as, in some degree, strengthening the evidence of his guilt. It is true, that the fact which he ought to have disproved, if he could, did not amount to direct evidence of the crime charged upon him. It was, nevertheless, a very material circumstance in the evidence against him, that he and his confederates had their rendezvous at a certain house, where they passed the night, except during that portion of it while they were engaged in committing the offence. If he could disprove this circumstance, but made no attempt

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to do so, the omission most certainly imparted a higher degree of credibility to the statement of the accomplice, and might justly influence the belief of the jury as to the truth of that statement.

We are of opinion that the exceptions to the charge were not well taken, and that the judgment should be affirmed.

All the judges concurring,

Judgment affirmed.

CHASE v. PECK.

Upon receiving a grant of land the grantee executed an agreement, not under seal, to support and maintain the grantor, pledging for that purpose the produce of the land, and should that prove insufficient, appropriating the entire fee. This agreement being the consideration of the grant, takes effect as an equitable mortgage of the land.

The grantee becoming insolvent and unable to perform his contract to maintain the grantor, reconveyed the land partly for the purpose of thus providing for the support of the grantor and partly to hinder and delay creditors: *Held*, that a judgment creditor purchasing the land, upon sale on execution, took subject to the equitable mortgage.

Under the practice established by the Code, the equitable mortgagee is entitled to prevail against an action to recover the possession of the land by the purchaser; the remedy of the latter is by suit to redeem from the mortgage and for an accounting if necessary.

APPEAL from the Supreme Court. Ejectment for one hundred acres of land in Otsego county. The plaintiff made title under a sheriff's sale, made June 12th, 1849, upon execution on a judgment against Alonzo Aylesworth, which became a lien on the land in question on the 31st of May, 1848. On the trial it was proved that Alonzo Aylesworth acquired title to the land by deed, from Isaac Howland and Sarah his wife, dated August 11, 1843. On that day they, being very aged

21	581
118	143
21	581
125	239

21	581
144	113

21	581
e163	428

21	581
166	271

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persons, conveyed the land to Aylesworth (who was their grandson) for the nominal consideration of one dollar. Nothing was paid in fact, but contemporaneously with the execution of the deed, Aylesworth gave back a writing not under seal, by which he certified that "the said Alonzo hereby pledges the entire use of the farm, this day conveyed to him, for the support of said Isaac and Sarah, and agrees to furnish all necessary support—such as victuals, clothing, medical aid, and all other necessary comforts of life—for both the said Isaac and Sarah; and agrees and binds himself to treat them kindly and wait upon them attentively and in a careful manner, during their natural lives and during the life of the longest liver of them, and should the produce of the farm be insufficient for that purpose, then the entire fee shall be appropriated for that purpose."

Aylesworth had been brought up by the Howlands, and was in his minority at the date of the above conveyance and agreement. They lived together upon the farm, Aylesworth managing it and providing for the support of his grandparents until after the death of Isaac Howland, in 1846. He then became involved in debt, and on the 29th of May, 1848, being insolvent, and several suits against him proceeding to judgment, he reconveyed the premises to Sarah Howland. No other consideration for the reconveyance was shown than that to be implied from the agreement of Aylesworth to support Mrs. Howland and his inability to perform it. The plaintiff claimed that the reconveyance was in fraud of creditors, and there was evidence warranting the jury in finding that an actual fraudulent intention, to keep the property from the reach of creditors was a leading motive for the reconveyance. Mrs. Howland lived upon the proceeds of the farm, a fair rent for which was shown to be some \$60 per annum, until she sold it in 1849 to a grantor of the defendant; neither Aylesworth, nor any person in his behalf paying anything, or rendering any service towards her maintenance. She died after the commencement of this suit and before the trial. The jury found a verdict for the plaintiff, and the judgment thereon was affirmed at general term in

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the sixth district. The defendant appealed to this court, where the case was submitted on printed arguments.

Abraham Becker, for the appellant.

E. E. Ferry, for the respondent.

DENIO, J. The determination of this case will depend upon the character of, and the effect to be attributed to, the instrument executed by Alonzo Aylesworth to Isaac and Sarah Howland, at the same time that the latter conveyed to him the premises in controversy. From the two papers, taken together, it is apparent that it was parcel of the consideration, upon which the conveyance was executed, that Aylesworth, the grantee, should support the grantors during their joint and several lives. The paper signed by him professes, in the first place, to pledge the entire use of the farm for that purpose; and it is added that, if its produce shall be insufficient for the object, the entire fee shall be appropriated to accomplish it. It was, probably, intended that the transaction should operate, to a certain extent, as a gift; but this was only so far as the value of the property conveyed should exceed the value of the return which was to be made for it. As respected the latter, the arrangement was a contract, which imposed a certain duty upon the grantee, to be performed for the benefit of the grantors, and which, moreover, attempted to create a lien upon the subject of the conveyance, to secure the performance of the duty undertaken by the grantee. The intention of the parties is plain; but the question to be considered is, in what legal or equitable light the arrangement is to be regarded by the court. In our opinion, the instrument signed by Aylesworth is to be considered as creating an equitable incumbrance in the nature of a mortgage.

By the law of England, as administered in the Court of Chancery, an equitable mortgage may be created by any writing from which the intention to create it may be shown; or it may be effected by a simple deposit of title deeds without writing. It will also be allowed in favor of a vendor, for un-

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paid purchase money, or of a purchaser who has advanced his money on the faith of a contract for a conveyance. (Miller on Equitable Mortgages, pp. 1, 2, 218, and cases cited.)

The courts of equity in this State have adopted the general doctrines of the English Chancery upon this subject, as upon many others. The cases of a mortgage created by a writing not sufficient to convey the premises, or by a deposit of title deeds, have not been frequent with us; but the doctrine has been applied in a few instances, and I do not find any judgment or *dictum* by which it has ever been questioned. In *Jackson v. Dunlap* (1 John. Ca., 114), a vendor of land had executed and acknowledged a conveyance to the vendee, but a part of the purchase money had not been paid, and it was then agreed that the grantor should retain the deed until the balance should be actually paid. It was equivocal upon the testimony whether the deed had been delivered so as to pass the title or not. If it had not been, the question we are considering would not arise; but KENT, Ch. J., considered the delivery complete, and that the deed was then retained by the grantor by way of security, till payment. This, he said, was the creation of an equitable lien in the grantee. The other judges seem to have been of opinion that the title did not pass. In *Jackson v. Parkhurst* (4 Wend., 369), it was held by the court, Judge SUTHERLAND giving the opinion, that the pledge or deposit of a deed with the grantor, by way of security, would give him a lien in the nature of a mortgage; but the case being at law, it was held that such a title could not be set up against the legal estate. In *The matter of Howe and wife* (1 Paige, 125), the English doctrine, that an agreement for a mortgage is in equity a specific lien on the land, was asserted and applied by Chancellor WALWORTH.

The cases in which a lien for the purchase money has been established, where the title had passed to the purchaser, are more numerous. (*Garson v. Grear*, 1 J. C. R., 308; *Warner v. Van Alstyne*, 8 Paige, 513; *Arnold v. Patrick*, 6 Paige, 310; *Hallock v. Smith*, 3 Barb. S. C. R., 267.) These cases proceed upon the same principle which the defendant seeks to establish.

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The difference in circumstance which exists in the present case is against the plaintiff; for Mr. and Mrs. Howland received back from Aylesworth a written instrument, in which the lien reserved was explicitly stated, while, in the cases referred to, the lien was predicated on the implied intention of the parties without a writing or even a verbal agreement for that purpose. Another example of the same doctrine is furnished, where there is an executory contract for the purchase of lands, the title remaining in the vendor; and subsequently to the contract he suffers liens upon the premises to be created. It is well settled, that the interest of the vendee will be protected against every one but a *bona fide* purchaser or incumbrancer who has advanced money or property without notice of the vendee's equity. (*Lane v. Ludlow*, 6 Paige, 316, note; *Parks v. Jackson*, 11 Wend., 442.) In such cases, the vendee is considered in equity as the owner, and the vendor as his trustee.

Assuming that it has been shown that Sarah Howland occupied the position of a mortgagee of the land to secure the agreement of Aylesworth to support her during her life, the next inquiry is, whether the plaintiff, by recovering a judgment against him and purchasing the premises on the execution, is in a better situation than he would have been were she, or her representatives, now asserting a claim against him to subject the premises to the payment of a compensation for the provision which he had failed to make. Upon this point, the cases already referred to for another purpose, and many others, are entirely decisive. It will be sufficient to mention the case *In the matter of Howe*, and that of *Arnold v. Patrick*, which are full to this purpose. In the last case, the equitable lien for the balance of the purchase money was established against a judgment creditor who had sold the land on execution, and had himself become the purchaser. The Chancellor said the plaintiff in the judgment was not entitled to claim protection as a *bona fide* purchaser, even if he had no notice of the facts establishing the equitable lien; "for," he added, "he bid in the property on his own judgment for an antecedent debt, paying no new consideration. He, therefore, took the legal

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title under the sheriff's sale, subject to the equitable lien for the unpaid purchase money."

Considering the rights of the parties to be such as have been mentioned, and the fact being that the defendant is in possession under Sarah Howland, the remaining question is, whether the plaintiff can maintain ejectment on his legal title against a party clothed with her equitable interest. It is well settled, that a mortgagee in possession, the mortgage being forfeited by non-payment, can defend himself in a possessory action brought by the mortgagor, though, if he were out of possession, he could not now maintain ejectment against the latter. (*Phyfe v. Riley*, 15 Wend., 248.) But this, I think, is not so, except in the case of a technical mortgage, conveying, subject to the condition, a legal title to the premises. (*Marks v. Pell*, *Jackson v. Parkhurst*, *supra*.) If the present were, therefore, an action of ejectment, prosecuted under the former practice, in which nothing but legal principles could be taken into consideration, then, as the deed from Aylesworth to Mrs. Howland has been found to be fraudulent, I think the defendant could not resist the plaintiff's title. But, since the blending of legal and equitable remedies, a different rule must be applied. The defendant can defeat the action upon equitable principles; and if, upon the application of these principles, the plaintiff ought not to be put into possession of the premises, he cannot recover in the action. It has been shown that the premises were, in effect, mortgaged to Howland and his wife to secure the performance of Aylesworth's agreement to support them and the survivor of them during life, and that the plaintiff has taken the place of Aylesworth. When he obtained title by the execution of the sheriff's deed, Aylesworth had been in default in the performance of his agreement for nearly three years. Mrs. Howland and her grantees, it is true, had been in possession, and had enjoyed the use of the premises, but no account has been taken to show how far the income derived from that source would go in fulfillment of the agreement. This action is not brought for a redemption, and is not adapted to that kind of relief. It would be manifestly inequitable to let the

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defendant into possession until he shall procure an account to be taken, and shall pay or tender the amount which shall be found in arrear upon the above mentioned agreement, executed by Aylesworth, for the support of Mrs. Howland up to the time of her death.

The judgment of the Supreme Court must be reversed; and, as we cannot certainly say what case the plaintiff may make, now that the legal principles which govern the action have been determined, there must be a new trial, with costs to abide the event. If the main features of the case cannot be changed, the only remedy for the plaintiff is to institute a suit for redemption, upon the principles which have been mentioned.

All the judges concurring,

Judgment reversed, and new trial ordered.

WILSON et al. v. ROBERTSON et al.

The appropriation by an insolvent firm of partnership property to the payment of the individual debts of one partner, is not simply void, but is fraudulent and avoids the deed of assignment.

So held in a case where the joint assignment included some individual property of the partner whose creditors were preferred, and he had brought into the partnership stock, an amount equal to his individual debts thus preferred, while the other partner contributed to the capital, an insignificant sum, less than the probable excess of the assigned estate after paying the preferred debts of his copartner.

APPEAL from the Supreme Court. The plaintiffs brought their action, as judgment creditors of the firm of Crocker & Staples (consisting of the defendants, Jonathan D. Crocker and Abraham Staples), to have set aside, as fraudulent and void, an assignment in trust for creditors, giving preferences, executed on the 17th June, 1850, by said firm to the defendants William P. Robertson and John S. Crocker. The grounds alleged for declaring the assignment fraudulent were, first, its authorizing a sale of the estate on credit; second, providing for the pay-

71	587
114	309
21	587
116	435
116	491
21	587
119	465
21	587
133	548
21	587
124	449
21	587
128	82
129	542
21	587
130	600
132	560
21	587
135	602

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ment, from the assets of the firm, of private debts of Jonathan D. Crocker, in preference to the debts of the firm, said firm being insolvent; third, as hindering and delaying creditors, and as executed with such intent; fourth, as being executed in trust for the benefit of the assignors, or one of them.

The assignment provided that the assignees should take possession of the property and effects assigned, "and sell and dispose of the same upon such terms and conditions as may in their judgment appear best, and most for the interest of the parties concerned, and convert the same into money." It then provided for the payment in full of the claims of certain persons (naming them), with all interest thereon, and if the assets were not sufficient to discharge them in full, then *pro rata*. Of the eight persons enumerated in this first class of creditors, five were the private and individual creditors of Jonathan D. Crocker, one of the assignors, whose claims exceeded \$1,200. The assignment then provided for a second class of creditors, to be paid, from the remainder of the assigned property (if there should be any), their claims in full, or *pro rata*. Of the eleven preferred persons in this class, four were the private and individual creditors of Jonathan D. Crocker, having claims amounting to over \$500. The whole sum of the preferred debts was nearly \$2,500. The preferred creditors being paid in full, the residue or remainder was to go: first, to pay copartnership debts not preferred; second, the private and individual debts of either of the assignors not preferred; and, third, to return the surplus (if any) to the assignors.

The trial was before a referee, who found, as facts, that some of the property assigned was individual property of Jonathan D. Crocker, not belonging to the firm; and among the creditors named in the first and second classes of the assignment there were individual creditors of the said Jonathan D. Crocker not the creditors of the firm; that the firm of Crocker & Staples was formed April 12, 1847, into the capital of which, Crocker put \$1,882.62, consisting of a stock of goods which he had on hand, the remains of a former stock in trade, some of which remained on hand at the assignment, and under it

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passed to the assignees; and Staples put into that capital \$170. Some of the individual debts of Jonathan D. Crocker were contracted before the formation of said firm, and some, which are (in form) notes against said Crocker, are, in fact or in equity, debts of the firm.

The referee reported, as conclusions of law from the facts, that the assignment was valid, and that the complaint in the cause be dismissed with costs. The plaintiffs appealed to the Supreme Court, where the judgment was affirmed, and they appealed to this court.

Hooper C. Van Vorst, for the appellants.

Amasa J. Parker, for the respondents.

WRIGHT, J. An assignment by an insolvent debtor of his property to trustees for the benefit of creditors, which expressly authorizes them to sell the property upon credit, is void as against the creditors of the assignor. (*Barney v. Griffin*, 2 Comst., 365; *Nicholson v. Leavitt*, 2 Seld., 510.) But an assignment will not be construed as conferring this authority when its language is consistent with a different interpretation which makes it legal and valid. In *Kellogg v. Slauson* (1 Kern., 302), the authority to sell was conferred in the precise language of the assignment in question; yet the assignment in that case was held valid. The case is a direct adjudication of this court that a power of sale, expressed in the identical terms of the instrument under consideration, is not obnoxious to the objection that it is an authority to sell on credit, or was so intended by the assignor. The point is no longer open for discussion. (*Whitney v. Krows*, 11 Barb., 198.)

There is, however, in my judgment, a fatal objection to the present assignment. The partnership effects of an insolvent firm are assigned to pay preferred private debts of one of the partners, for which neither the firm nor his copartner were liable. There is no controversy as to the facts touching the question. In April, 1847, Crocker & Staples formed a copart-

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nership in the mercantile business, in the county of Washington, and prosecuted the business until the 17th June, 1850, incurring firm debts for their stock in trade, among which was that on which the plaintiffs' judgment was recovered. On the 17th June, 1850, as the referee finds, they were insolvent, and unable to pay their debts; and, in fact, the evidence showed that they were unable to discharge in full even the claims of preferred creditors. Being thus insolvent, they executed an assignment in trust for creditors. The instrument purported to assign and transfer all the property, real and personal, of the firm, or of either of the members of it, more particularly described in a schedule annexed. It embraced partnership property wholly, with the exception of a house and lot, the individual property of Crocker, which was incumbered by two mortgages for more than the value. The assignment directed the conversion of the estate into money, and after deducting the expenses of executing the trust, the assignees, with the residue or net proceeds and avails, were to first pay and discharge in full the debts due or to become due from Crocker & Staples, or either of them, or for which they, or either of them, were liable to Joel Colvin and seven other persons (naming them), together with all interest money due or to grow due thereon; and if the avails were insufficient to discharge the same in full, then they were to be paid *pro rata*. Of the eight persons enumerated in this first preferred class of creditors, it is admitted in the answer of the defendants that five, having claims for over \$1,200, were private and individual creditors of Jonathan D. Crocker, one of the assignors, and that the debts existed against Crocker at the time of the formation of the partnership, in April, 1847. In the second class of preferred creditors eleven persons were named, three of whom were the private creditors of Crocker, having claims for over \$500, and which debts existed against him prior to April, 1847. The whole amount of the preferred debts was about \$2,500, of which over \$1,700 were private liabilities of Crocker, whilst the value of the assigned estate was but little beyond the sum of \$2,000. In the third class were partnership credi-

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tors, not before preferred. In the fourth class were the private creditors of each of the assignors not before preferred; and, lastly, the surplus, if any, was reserved to the assignors jointly. The question, therefore, is distinctly presented, whether it is a fraud upon the creditors of an insolvent firm for such firm to assign the partnership effects in trust to pay the private debts of the individual members to the extent of nearly exhausting the joint fund, or to any extent, where such fund is inadequate to satisfy the creditors of the firm. The question cannot be said to be embarrassed by the irrelevant fact, found by the referee, as to the amount of capital contributed by each of the partners in April, 1847; nor by the still further suggestion made on the argument, that it was a joint and several assignment of a mixed fund to pay both private and partnership debts. It was a joint assignment of the joint property and funds; and although Crocker's equity of redemption in the lot and dwelling may have passed to the assignees under the assignment, there was nothing thereby added to the fund.

The Supreme Court held that the provision violated no statute, but only a principle of the common law, which gives partnership creditors a preference in payment out of partnership property over the individual creditors of the several partners. Hence it did not invalidate the whole assignment, by rendering it fraudulent and void. Being inequitable in reference to the partnership creditors, and an infringement of their rights, the provision was an illegal one; but, not being fraudulent, it did not vitiate any other part of the assignment. It may be true (though it is not free from doubt), that if an assignment contains a provision to pay individual debts out of partnership property, and this is not a violation of any statute, it cannot be set aside at the instance of a single creditor seeking to appropriate the funds to his individual benefit. But it is unnecessary to follow up this inquiry, as it seems very plain that the insertion of such a provision in an assignment of the partnership effects of an insolvent firm is a violation of the statute in respect to fraudulent conveyances, and furnishes conclusive evidence of a fraudulent intent on the part of the as-

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signors. Its operation, in this case, was not only to hinder and delay the plaintiffs, as creditors of the firm, but, if successful, to cheat them out of their entire demand.

It will be conceded that the creditors of the firm are, legally and equitably, first entitled to the partnership effects. Such creditors have a claim upon the joint effects prior to every other person, which the court will enforce and protect alike against the individual partners and their creditors. Indeed, the partnership property must be exhausted in satisfying partnership demands before resort can be had to individual property of the members of the firm. The firm is not liable for the private debts of one of its members, nor is there any liability resting upon the other members in respect to those debts. An appropriation of the firm property to pay the individual debt of one of the partners is, in effect, a gift from the firm to the partner—a reservation for the benefit of such partner, or his creditors, to the direct injury of the firm creditors. Can it be reasonably doubted that, when an insolvent firm assigns their effects for the payment of the private debts of a member, for which neither the firm nor the other members, nor the firm assets nor the interests of the other members therein, are liable, such an assignment and appropriation are a direct fraud upon the joint creditors of the assignors? An insolvent copartner, says the late Chancellor, who was unable to pay the debts which the firm owed, would be guilty of a fraud upon the joint creditors, if he authorized his share of the property of the firm to be applied to the payment of a debt for which neither he nor his property was liable at law or in equity. (*Kirby v. Schoonmaker*, 3 Barb. Ch. R., 48; *Buchan v. Sumner*, 2 *Id.*, 207.) Yet the coassignor and copartner, Staples, does that in this case. The prior right of the creditors of the firm to its effects cannot be impaired by any consideration having reference to the interests of the individual partners; and anything which defeats this right, or hinders or delays such creditor in enforcing payment of his demand against the firm, from the firm property, is a violation of the statute, and a fraud upon such creditor. In this case, Crocker & Staples, in June, 1850, after

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being in business over three years, find themselves insolvent, and unable to pay their debts. They have on hand firm property and assets (perhaps created by the partnership debts), upon which the creditors of the firm have an equitable lien, and a priority of right to enforce payment. It is possible that the law would tolerate an assignment of this partnership property in trust for the benefit of creditors of the firm, giving preferences among them, provided there was an absolute and unconditional surrender of the entire estate to the payment of the firm debts; but no further. The partnership property is assigned by the firm to trustees, not to pay the partnership debts, but the preferred private debts of Crocker, one of the partners, which neither the firm nor Staples, the other partner, were liable, in law or equity, to pay; thus not unconditionally surrendering the effects of the firm for the benefit of those to whom they rightfully belonged, but creating a trust by which the prior right of the creditors of the firm to such effects is postponed, or hindered and delayed in its enforcement. The chances of the firm creditors being paid from the partnership fund are made to depend upon its sufficiency to pay the private debts of Crocker, preferred in the first and second classes of the assignment, which are to be paid in full before the plaintiffs or any other creditors of the fund, who are provided for in the subsequent classes, are to be paid anything. This hindrance and delay is the inducement to the trust, and the main purpose for which it was created. The act defeats the right of the plaintiffs, as creditors of the firm, to seize and compel the payment of their demands against such firm from its effects; and the firm being insolvent, and its effects insufficient to reach or pay the plaintiffs, as creditors of the firm who are provided for in the third class, the assignment and its provisions not only hinder and delay the plaintiffs, but defraud them of their whole demand. Having such an effect, it cannot be doubted that the assignment was a fraud upon the plaintiffs. The firm, or Staples, was not liable, in any way, to the private creditors of Crocker; and the attempt to assign partnership property to pay the private debts of one of the partners, when the firm

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was insolvent, affords a conclusive presumption of an actual fraudulent design on the part of the assignors. Neither the firm nor the copartner Staples were in a condition to make a gift of the firm assets to Crocker or his creditors, or, in substance, to reserve from the joint and partnership fund the larger proportion of it for his and their benefit. It is this fraud that we should sanction by upholding the trust in the present case. In *Collomb v. Caldwell* (16 N. Y. R., 484), an assignment was adjudged void as to the individual creditors of the assignors, when the members of an insolvent mercantile firm assigned their partnership property, and also their individual property, in trust for the payment of their partnership debts, reserving any surplus that should remain to the assignors. The individual property of the members of the firm was appropriated to pay partnership debts, and any surplus reserved to the assignors, whilst the individual debts of one of the members of the firm were left unprovided for. This attempt to tie up the whole fund under a trust, and, after the trusts were satisfied, reserving any surplus to the assignors, without making provision for paying the individual debts, was adjudged to afford a conclusive presumption of an actual intent to defraud the individual creditors of the assignors. So, also, an assignment of the effects of an insolvent firm to pay the private debts of the individual members, as was done in the case at bar, hindering, delaying and postponing the collection of the demands of the company creditors, is equally fraudulent and void as to such latter creditors. Indeed, independent of the question of fraud, it may be seriously doubted whether the assignment should not be regarded as executed, and the trust made, for the benefit of the assignors, or one of them, and thus void under the statute declaring "all transfers and assignments of goods, &c., made in trust for the use of the person making the same, void as against the creditors of such person." (2 R. S., 135, § 1.) The assignment is made for the benefit of Crocker, as its purpose is to liquidate and discharge his individual debts. The transfer may, therefore, be said to be made in trust for the use of one of the assignors. This is the spirit of the transac-

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tion, if not its legal effect. Crocker is enabled to appropriate the partnership funds to relieve himself from individual liability.

The judgment of the Supreme Court, affirming the judgment of the referee, adjudging the assignment valid and dismissing the plaintiff's complaint, must be reversed, and a new trial granted.

All the judges concurring,

Judgment reversed, and new trial ordered.

THE PEOPLE, *ex rel.* Herrick *et al.*, v. SMITH, County Judge of Suffolk County.

The statute in relation to highways on Long Island (ch. 56, of 1830), does not entitle the owners of land to be taken to notice of the application to the commissioners to determine upon the expediency of making the appropriation, nor of the hearing before the county judge upon an appeal from the commissioners' refusal, to lay out a highway.

The propriety of taking private property for a public use is not a judicial question, but one of political sovereignty, to be determined by the legislature, either directly or by delegating the power to public agents, proceeding in such manner and form as it may prescribe.

The constitutional provisions for trial by jury, and for due process of law which control in respect to the mode of ascertaining the compensation to be paid to the citizen upon taking his property, do not apply to the determination of the question whether it is needed for public use.

APPEAL from a judgment of the Supreme Court. The relators sued out a *certiorari*, for the purpose of reviewing an order of the County Judge of Suffolk County, whereby he reversed an order of the commissioners of highways of the town of Riverhead—refusing to lay out a highway in that town, pursuant to a petition of twelve freeholders—and proceeded to lay out such highway. The relators are owners and occupants of a part of the lands through which the highway, so laid out, runs; which

21	595
112	74
21	595
155	27
21	595
el63	139
21	595
167	259

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lands will have to be appropriated for its track. The single ground of error relied on, was, that no notice was served on the relators of the proceedings, on the appeal, or of the hearing before the County Judge. The Supreme Court, being of opinion that such notice was not required by law, affirmed the order of the judge, and from this judgment of affirmance the present appeal was taken by the relators. The case was submitted on printed arguments.

Miller & Tuthill, for the appellants.

William Wickham, for the respondent.

DENIO, J. The subject of highways and bridges on Long Island, is regulated by a statute passed in 1830, entitled "An act regulating highways and bridges in the counties of Suffolk, Queens and Kings" (ch. 56). The system, in its general features, is similar to that established by the Revised Statutes for other parts of the State; but there are some discrepancies, and upon them, I think, the question in the present case may turn. By the Long Island act, the commissioners have power to lay out new roads without the consent of the owners of the land through which they may run, upon the petition of twelve freeholders of the town, verified by oath or affirmation. (§§ 2, 47.) Nothing is said respecting their giving notice to any one of the hearing of the application before them. Every person conceiving himself aggrieved by a determination of the commissioners, either in laying out, or refusing to lay out a highway, may appeal to three judges of the Court of Common Pleas. (§ 66.) This jurisdiction is now vested in the County Judge under the present Constitution. (Laws 1847, p. 642, § 27.) Where the determination appealed from, is against an application for laying out a road, the judge is to give notice of the time and place of hearing the appeal, to the commissioners by whom such determination was made; and where the commissioners' determination was in favor of the application, notice is not only to be given to the commissioners, but to one or more of the

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applicants for the road. (§ 69.) The proofs and allegations of the parties are to be heard, and where the appeal is from an order refusing to lay out a road, the judge is to lay it out in the same manner in which commissioners are directed to proceed in like cases. (§§ 71, 74.)

It will thus be seen that the only notice which the statute requires to be given, in a case like the present, is, of the time and place of hearing the appeal, and that such notice is only required to be given to the commissioners who made the order appealed from. If the commissioners had been required to give any notice of the hearing before them, then, when the judge came to lay out the road, in consequence of his reversal of the order of the commissioners, he ought to give the same notice, because he is required to proceed, in the performance of that duty, in the same manner in which the commissioners were directed to proceed when the case was before them; but in the absence of any provision for notice of the hearing before the commissioners, no such duty is required of the judge. It follows that, if the relators, as owners and occupants of the land which was to be taken for the road track, were entitled to notice of the hearing before the judge, it is in consequence of some general principle of law, and not because it is required by any provision of the statute. This is the view of the matter taken by the appellant's counsel, for he expressly admits in his printed argument that there is nothing in the act requiring notice to be given to the land owners.

The question then is, whether the State, in the exercise of the power to appropriate the property of individuals to a public use, where the duty of judging of the expediency of making the appropriation, in a class of cases, is committed to public officers, is obliged to afford to the owners of the property an opportunity to be heard before those officers when they sit for the purpose of making the determination. I do not speak now of the process for arriving at the amount of compensation to be paid to the owners, but of the determination whether under the circumstances of a particular case the property required for the purpose shall be taken or not; and I am of opinion that the

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State is not under any obligation to make provision for a judicial contest upon that question. The only part of the Constitution which refers to the subject is that which forbids private property to be taken for public use without compensation, and that which prescribes the manner in which the compensation shall be ascertained. It is not pretended that the statute under consideration violates either of these provisions. There is therefore no constitutional injunction on the point under consideration. The necessity for appropriating private property for the use of the public or of the government is not a judicial question. The power resides in the legislature. It may be exercised by means of a statute which shall at once designate the property to be appropriated and the purpose of the appropriation; or it may be delegated to public officers, or, as it has been repeatedly held, to private corporations established to carry on enterprises in which the public are interested. There is no restraint upon the power, except that requiring compensation to be made. And where the power is committed to public officers, it is a subject of legislative discretion to determine what prudential regulations shall be established to secure a discreet and judicious exercise of the authority.

The constitutional provision securing a trial by jury in certain cases, and that which declares that no citizen shall be deprived of his property without due process of law, have no application to the case. The jury trial can only be claimed as a constitutional right where the subject is judicial in its character. The exercise of the right of eminent domain stands on the same ground with the power of taxation. Both are emanations of the law making power. They are the attributes of political sovereignty, for the exercise of which the legislature is under no necessity to address itself to the courts. In imposing a tax or in appropriating the property of a citizen, or a class of citizens, for a public purpose, with a proper provision for compensation, the legislative act is itself due process of law; though it would not be if it should undertake to appropriate the property of one citizen for the use of another, or to confiscate the property of one person or a class of persons, or a par-

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ticular description of property upon some view of public policy, where it could not be said to be taken for a public use. (*The People v. The Mayor of Brooklyn*, 4 Comst., 419; *Taylor v. Porter*, 4 Hill, 140; *Wynehamer v. The People*, 3 Kern., 378.)

It follows from these views that it is not necessary for the legislature in the exercise of the right of eminent domain, either directly, or indirectly through public officers or agents, to invest the proceeding with the forms or substance of judicial process. It may allow the owner to intervene and participate in the discussion before the officer or board to whom the power of determining whether the appropriation shall be made in a particular case, or it may provide that the officers shall act upon their own views of propriety and duty without the aid of a forensic contest. The appropriation of the property is an act of public administration, and the form and manner of its performance is such as the legislature shall in its discretion prescribe. In the case before us the act declares that the judge shall give notice to the commissioners of highways whose order is appealed from, and it is silent as to notice to any other person. The appellants and the commissioners are the only parties who are required to be convened on the hearing before the judge, or to have notice of that hearing, and it is their proofs and allegations only which the judge is obliged to hear. It was doubtless considered that the commissioners, who had officially decided against the act which the appellants were seeking to promote, would sufficiently represent the views upon that side of the question. But if we should think it was discreet that the land owners should have been furnished with notice and allowed to participate, still the act furnishes the rule, and the court has no power to change it.

The counsel for the appellant relies upon the case of *The People v. The Judges of Herkimer* (20 Wend., 186), where it was held that a written notice of a hearing upon appeal before the judges in a case like the present, which was governed by the Revised Statutes, ought to be given; and the proceedings of the judges were reversed for the want of such a notice. The case illustrates the difference between the general highway law

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and the system provided for Long Island in this respect. The 61st section of the general statute (1 R. L., 514) provided that before the commissioners should determine to lay out the highway, they should cause notice in writing to be given to the occupant of the land through which it was to run, of the time and place at which they would meet to decide the application, and this notice was to be served three days before the time of meeting; and the 91st section declared that when the appeal to the judges was from a refusal to lay out a road and that determination was reversed, the judges should themselves lay out the road; and it is added that "in doing so they shall proceed in the same manner in which commissioners of highways are directed to proceed in the like cases." Hence it was plain that the judges ought to give the notice before laying out the road. It was also held, though that is not material here, that the notice should have been given of the hearing of the appeal, since the decision to reverse the order of the commissioners and to lay out the road was substantially the same thing; as the latter act necessarily resulted from the former. The difference between the cases is, that the Revised Statutes provide for giving the notice, the want of which is here objected to, and the Long Island act does not. The judgment of the Supreme Court must be affirmed.

All the judges concurring,

Judgment affirmed.

[END OF CASES DECIDED IN THE JUNE TERM.]

ADOPTED AT JUNE TERM, 1890.

According to existing laws, causes which are preferred take their preference in the following order:

1. Criminal actions.
2. Cases of probate, in which the appeal prevents the issuing of letters testamentary or of general administration.
3. Appeals in which the sole plaintiffs or defendants are executors or administrators.
4. All other preferred cases.

Any party claiming a preference must so state in his notice of argument to the opposite party, and to the clerk, and he must also state the ground of such preference, so as to show to which of the above classes the case belongs. In making up the calendar, the clerk will place the preferred causes at the head in the order above prescribed. A preferred cause being once passed without reservation, will take its place in subsequent calendars without preference.

NOTE.—Applications are continually made by letter to counsel in attendance upon the court, to procure a cause to be reserved, without furnishing any evidence of the consent of the opposite party, or disclosing any sufficient ground for an indulgence which, in the present state of the calendar and of the law in respect to preferences, generally operates to occasion uncertainty, inconvenience and delay to those who are ready or preparing to argue their causes, as soon as they can be reached. Especially is this the case in respect to preferred causes which the parties upon the general calendar have a right to suppose will be urged to a hearing with the extreme diligence. It should be understood, therefore, that such an application, is now scanned with somewhat more strictness than heretofore: that it is a *motion* to be made like other motions, upon affidavit and notice, or upon the written stipulation of the parties, setting forth an adequate reason for the reservation proposed.

REPORTER.



MEMORIAL.

On the last motion day of the June Term of the Court of Appeals, FRANCIS KERNAN said in substance :

May it please the Court: On the death of the Hon. SAMUEL BEARDSLEY, of Utica, which occurred since the last Term of this Court, the members of the Bar of Oneida County met to express their sorrow for his loss and their respect for his character. At that meeting over which a member of this Court, Judge DENIO, presided, resolutions were passed expressive of their sentiments.

In consideration of the deservedly high estimation in which the deceased was held throughout the State as a citizen and a member of the legal profession, and also in view of the exalted official positions which he had occupied in connection with the administration of the law, having been Attorney-General of this State, and Chief Justice of the former Supreme Court, the meeting deemed it not improper to appoint a committee to present to this Court a copy of its proceedings, and to request that they be preserved with its records, and that the resolutions which were adopted, be entered upon the minutes of the Court as a memorial of the respect and esteem in which the deceased was held by the Bench and Bar of this State.

Judge Gridley, Mr. Hunt and myself were named as such committee; and I now, at their request, and on behalf of the Bar of the County of Oneida, from whose ranks Judge BEARDSLEY rose, and whom its members regarded with pride as one of their representatives, present to the Court the proceedings of the meeting, and the following resolutions, which it unanimously adopted :

Whereas, It has pleased Divine Providence to remove from our midst the Hon. SAMUEL BEARDSLEY; and we, his professional brethren, have assembled to express our estimate of his character as a jurist and as a man. Therefore it is

Resolved, That in the recent death of Judge BEARDSLEY, the members of the Bar, not of Oneida county only, but of the entire State, have lost one of their oldest and most distinguished associates; and the community at large a public servant, who discharged the various public trusts with which he was honored, with a Roman firmness and an unbending integrity which knew neither friend nor foe.

Resolved, That in a public career of over forty years which the deceased has passed, whether we regard him as a legislator in the Senate of our State, or in the wider field of our national councils; or, as an administrator, having the interest and honor of the public in his keeping, as prosecuting Attorney for Oneida county, and the northern district of the United States, and as Attorney-General of the State; or as a Judge and Chief Justice of the Supreme Court, to decide the law between man and man, we shall find him displaying the same great and commanding qualities. As a legislator he was bold, fearless and decided. As the depository of the interests of the State, he was

sternly honest and patriotic, and in his judicial capacity he manifested the same strength and power of intellect, the same caution in his reasonings to determine what was right, and the same unconquerable firmness in carrying out the principles he adopted.

Resolved, That we not only lament his departure on account of his strong intellect, his moral firmness, and his peculiar judicial qualities, but, also, as members of the Oneida Bar, we deplore his loss as the last connecting link which united the present generation of lawyers with the departed stars of the profession—with a Gold, a Platt, a Storrs and a Talcott, names which made Oneida *primus inter pares* among her sister counties, and made it a distinction to belong to the Oneida Bar.

Resolved, That we are aware there are private sorrows attending the reading of near and tender ties, upon which it is not our province to intrude, except to tender to the family and afflicted relatives of the deceased, our sincere condolence, and to assure them that they have our warmest sympathy in their affliction.

Resolved, That as a testimony of our respect to his memory and our grief for his loss, the members of the Bar will go into mourning, by wearing crape on their left arm for thirty days, and will attend his funeral in a body.

Resolved, That a Committee of three persons be appointed for the purpose of procuring a portrait of the deceased, to be placed in the Court room of the city of Utica.

Mr. Kernan, after reading the resolutions, said that it was scarcely appropriate for him to attempt to eulogize the deceased before this Court, whose members knew him so intimately and had so often listened to his forensic efforts; and that he would move that the proceedings and resolutions be filed and entered as requested.

Mr. Justice PECKHAM then addressed the Court as follows:

Though not now numbered among the practising members of the Bar, I desire to say something of the deceased, whom I knew so intimately and loved so well. Who did not acknowledge, when the death of SAMUEL BEARDSLEY was announced, that a great and good man had departed? Occupying the highest positions in the land, he had dignified and adorned them all by his rare virtues and eminent ability. No full justice can be done to his great character on an occasion like this. A brief allusion is all that can be indulged.

Like most of the great men in our country, his position, in early life, was extremely favorable to the development of his talents. His parents, though highly respectable, were poor; hence the son's capacity was not obscured nor his mental growth retarded by pampered indulgence, nor by the want of strong incentive to action. He enjoyed, what most parents strive through life to shield their sons from, the benefits of early poverty. He taught a common school as the means of finishing his professional education.

His unusual energy brought his faculties into early action, and before his admission to the Bar, their power was manifested in the office where he studied. He was under the tuition of a highly respectable lawyer, but the unusual research and vigor which that lawyer's briefs presented, after young BEARDSLEY entered his office, plainly made known to the court that an additional fountain of legal

light had been opened there. Soon after his admission he stepped into the front rank of the Bar of Oneida county, and thence proceeded, until, for years before his decease, he was regarded, by common consent, as one of the first, if not the lawyer of the State. After he left the bench, as Chief Justice of the Supreme Court, though not engaged in as many cases as some others, he was counsel in nearly all of the most important in the Court of Appeals—causes involving from thousands to millions of dollars. In speaking of his ability, the late Nicholas Hill informed me, some few years before his death, that he had been retained as counsel in a very important cause with liberty to choose his colleague from the ablest in the country, and that, without any hesitation, he selected Judge BEARDSLEY.

His industry was untiring and pre-eminent; in a profession peculiarly of labor, never satisfied with tasting the stream, he always went to the fountain of the law. For nearly twenty years prior to his death, his eye-sight had become so much impaired that he could read only with great difficulty, and scarcely at all at night. Yet no lawyer was so universally ready, or more fully and thoroughly prepared in his cases.

Method and order marked the preparation of his causes; hence his labor was effective. He never wandered on in confused uncertainty deceived by false analogies, but each step was the firm foundation for another. Like the approaches of the scientific engineer in the taking of a fortress; each day's labor told the progress of his work. His learning was both accurate and profound, and he relied, in his arguments, far more upon principles than cases. Though no man whom nature has not well endowed, can, by any amount of exertion, ever become an eminent lawyer, so none, however gifted, can attain high distinction in that profession without great labor. Judge BEARDSLEY had *mens sana in corpore sano*, with a will to work which nothing could daunt or discourage. He had that rare gift to men, strong common sense, the indispensable foundation of all greatness in his profession. As a Judge he was careful, patient, thoroughly mastering his causes as to facts and law, fortifying his opinions with principles and authorities, which his sound judgment pertinently applied. Those opinions are deep wells of legal knowledge, from which the profession may draw and be refreshed and strengthened legally and morally.

Although so distinguished as a lawyer and a judge, in the opinion of most men, his peculiar sphere was as a politician and a statesman. Careful, even extremely cautious as a judge, as a statesman he was bold and fearless; untrammelled by the shackles of precedent, there he

was entirely self-reliant. Familiar with all the great questions of the country, and thoroughly imbued with a knowledge of the true principles of our government, of patriotic purposes and indomitable will, he was peculiarly adapted to the management and guidance of public affairs. No political storm could intimidate, it only nerved him firmer for the conflict. Sagacious and farseeing in debate, he seized upon the great principles involved in public questions, and maintained the right with an unyielding courage and a logical power that rarely failed to carry conviction if it did not command success. He never addressed the fancy of his audience. Clear argumentation, and a bold, indignant denunciation of wrong were his chief weapons; and in his hands they were almost universally fatal to an undeserving adversary. There was no limit to his courage. His bold language in assailing the measures of political opponents sometimes startled the more timid among his own party, though they were carried along by the energy and iron will of his stronger nature. His speech against the United States Bank, during the administration of Gen. Jackson, will never be forgotten while our history shall be remembered. "Perish credit, perish commerce, perish the State institutions," rather than be governed by a *moneyed oligarchy*, was the earnest sentiment of the man and in entire harmony with his unyielding character. He had all the elements for what he was conceded to be, a commanding leader of his party in the House of Representatives. He knew men and the springs of human action, and was able to inspire them with a portion of the same spirit that fired his own bosom. He had really more of the Gen. Jackson in him than any of the public men that survived that old hero.

Hence many have deemed it a mistake in his career, when he abandoned the national arena, resigning his seat in Congress, to accept the office of Attorney-General of this State.

Eminent as he was in ability, he was not less distinguished for the high-toned, manly integrity that characterized every act of his life. To say that he was honest, conveys no adequate conception. Fidelity and truth were in every element of his nature. Many lawyers deem it entirely admissible, in preparing amendments to bills of exceptions, to speculate upon the forgetfulness, the possible partiality or fear of appearing ridiculous, of the Judge, who tried the case. Judge BEARDSLEY was not of that number. The late Joshua A. Spencer, who had practised law in the same town with him for more than a quarter of a century, in alluding to the chivalrous integrity of Judge BEARDSLEY, observed to me, that he never felt called upon to examine,

with much care, bills of exceptions or amendments from him, as he knew they were always prepared with a scrupulous regard for the truth of the case, as it occurred on the trial. Nor was he in the habit, in the argument of cases, as your Honors well know, of expressing his own opinion to the court, as to the merits of his cause. He chose to prove his case in the legitimate mode of authority and argument. But if he did express it, all knew you might rely, with entire certainty, upon its sincerity. He could never stoop to win a cause at the expense of candor. No consideration of interest could purchase from him an opinion, as a lawyer, he did not believe to be sound. Though a strong party man, a firm, unchanging Democrat throughout his life, having no sympathy with those seeking to abolish slavery in the District of Columbia, without the consent of the South as well as the North, he could not be induced to withhold, even from them, rights which he believed the Constitution secured to all. Hence, the celebrated Atherton resolutions, as to the right of petition, met his unqualified opposition. Possessed of the most tender sensibilities and sympathies, yet, as a Judge, he had no sickly sentimentality in awarding the punishment due to high crimes. In such cases, as in all others, legal justice was administered by him in its sternness and its purity. Knowing his character, not even the next neighbor of corruption, illegitimate, outside intermeddling, by way of confidential information and advice, ever approached him, as it sometimes does lesser judges, to their confusion and misleading. Not merely honest himself, he was the stern foe of fraud in all places. His Congressional career showed that if corruption existed anywhere within the field of his investigations, either in friend or opponent, it was sure to be discovered and exposed. His duty was always discharged. Integrity was a characteristic, even of his manners. Though a candidate at various times for popular favor, in fact a public man, he never sought popularity by changing, in the slightest degree, from that urbane dignity and manly mien, the opposite of that of a demagogue, that always marked his carriage. As your Honors know, he never flattered a court. His noble nature could not shrink down into the sycophant. There was nothing of servility, nothing of hypocrisy, nothing of sham in the man. A delicate modesty, apparent to every eye, always shown with peculiar grace upon the hardier features of his character. Hospitable and social in private life, in his family most kind and tender, no man more enjoyed the society of his friends. Having completed the business of the day, it was peculiarly grateful to him to meet them, in the confidence of private friendship, and then it was delightful to be in the

sunshine of his presence. Though not a flowing or continuous talker, he yet charmed you with his cordial kindness and genial humor.

"Lofty and sour to them that loved him not;
But to those men that sought him, sweet as summer."

Slow to yield his confidence; when once obtained, he was your friend forever. Such a man must necessarily be, as he was in fact, the idol of his family and friends. Such, in brief, was SAMUEL BEARDSLEY—a leading, controlling, guiding light in our State. Such men are the pillars of our Republic, and he was one of its firmest and proudest. But two short weeks before his death, his noble form was here; and his voice, strong as ever, was heard before this high tribunal. He died, literally, with his armor on; his great powers, mental and physical, in unimpaired vigor. Other men are found of marked physical and moral courage, of independent self-reliance; some of incorruptible integrity and chivalrous honor; some of eminent ability, as statesmen or as lawyers; some of indomitable, iron will; others of lofty patriotism; but where do we find all these high qualities combined and developed in their strength and perfection, as in our departed friend? Where, in this great Republic, can the eye rest upon another SAMUEL BEARDSLEY? Let us then do honor to his memory, as we would encourage reverence for great talents, united with exalted virtues. If my heart inclined me to eulogy, you, who know him well, know how inadequate are my words to do justice to his great deserts, to the simple beauty and majestic dignity of his character.

COMSTOCK, Chief Judge, responded as follows:

The members of this Court are deeply sensible of the loss sustained by the legal profession, and the public, in the death of Judge BEARDSLEY.

Our deceased brother had many qualities which commanded our admiration and regard. In him were united a vigor and clearness of understanding rarely equaled: a fearless independence: an integrity none questioned; with great kindness of heart, and an unflinching courtesy of manner.

We think this mark of respect is due to his great eminence at the bar, and as a jurist, and to the upright and blameless character which he sustained in all the relations of a long and well spent life. Anxious to honor, so far as in our power, a name so distinguished and a character so exemplary and attractive, we take a pleasure, mingled with sadness, in granting the request which has been made, that these proceedings be entered in the minutes of the Court.

I N D E X.

A

ABATEMENT.

See PLEADING.

ABANDONMENT.

See INSURANCE, 1-4.

ADMISSIONS.

See EVIDENCE, 2, 7, 18.

ADVERSE ENJOYMENT.

1. The continued user, for more than twenty years, of an easement injurious to the land of another, e. g., overflowing his land with water, authorizes the presumption of a grant. *Hammond v. Zehner*, 118
2. It is for the party submitting to the user in such a case, to show that it was by license or permission, and not for the party exercising it to prove an express claim of right in order to characterize the user as adverse. *id*

See WATERCOURSE.

SMITH.—VOL. VII.

AGREEMENT.

1. Where a proposition for a contract, to be in writing and executed by the parties, has been made by one party and accepted by the other, the terms of the contract being in all respects definitely understood and agreed upon, the party refusing to execute the contract is responsible, it seems, on the breach of his agreement for the same damages as would be recoverable for an entire refusal to perform the contract after its execution in writing. *Per* SELDEN, J.; COMSTOCK, Ch. J., WELLES and BACON, Js., concurring. *Pratt v. Hudson River Railroad Co.*, 305
2. An action may be maintained upon the contract as completed, by the offer and acceptance. *Per* DENIO, J. *id*
3. The complaint counting upon the offer and acceptance, without any reference to the provision for a written contract, the variance is merely formal, and this court will conform the pleadings to the proof to sustain a judgment for the plaintiff. *Per* SELDEN, J.; COMSTOCK, Ch. J., WELLES and BACON, Js., concurring. *id*

4. The defendant was a railroad corporation, and its engineer was charged by it with the duty of engrossing the contract and procuring the signature of the contractors, for which no particular time was fixed and no limitation was imposed upon his power: *Held*, that such engineer's consent to a delay of a month in the execution of the written contract was within the authority with which he was clothed by the nature of his employment, and that the defendant could not repudiate the contract on account of such delay, even if unreasonable. *id*
5. On a written contract to "deliver 25,000 pale brick for \$3 per M, and 50,000 hard brick at \$4 per M, cash," the delivery, or readiness and offer to deliver the entire quantity, is a condition precedent to payment. *Baker v. Higgins*, 397
6. Parol evidence is inadmissible to show that the parties intended that payment should be made for each parcel of the brick, as they should be delivered. *id*
7. A party under contract to deliver articles by the wagon-load, and entitled to pay for each wagon-load as delivered, does not waive that right, but may treat the contract as broken by a single failure to make payment upon tender of delivery, although he has repeatedly delivered loads without payment, and has given the other party no notice of his intention to insist upon immediate payment thereafter. *Gardner v. Clark*, 399
8. The defendant contracted to sell and deliver rye, corn and oats at stipulated prices, and upon the plaintiffs giving security for payment. After delivering the rye without any security, and receiving payment thereof, he refused to deliver the other grain, upon the ground that the plaintiffs' failure to give the security discharged the contract: *Held*, that the defendant's conduct was a waiver of the terms of the contract in respect to the grain delivered, and that the plaintiffs tendering security for the residue were entitled to damages for the non-performance of the contract. *Cornwell v. Haight*, 462
9. *It seems*, that the refusal of the defendant upon such an avowed ground is a repudiation of the contract, and relieves the plaintiffs from the obligation to show a tender of performance on their part. *id*

AMENDMENT.

See AGREEMENT, 5.

BILLS OF EXCHANGE AND PROMISSORY NOTES, 5.

FRAUD, 3.

APPEAL.

1. Upon appeal, this court will presume nothing in favor of the party alleging error; but, if compelled, by the imperfection of a referee's report or the statement of facts, to resort to presumptions, will adopt such only as will sustain the judgment. *Carman v. Pultz*, 547

2. Accordingly, where the case shows a defect in a deed tendered which afforded a good reason for refusing to accept it, but might have been remedied if pointed out, it cannot be presumed, in the absence of any statement to that effect, that the refusal was put on that ground; but, on the contrary, in support of the judgment, it is to be presumed that the refusal was on some other untenable ground, or no ground at all. *id*

ARBITRATION AND AWARD.

1. An action upon an award may be brought in the Supreme Court, although the submission provides for judgment in the County Court. *Burnside v. Whitney*, 148
2. The right of action is not suspended until the term of the County Court succeeding the award. The defendant desiring to move that court for relief may obtain a stay of proceedings. *id*

APPORTIONMENT OF RENT.

1. As between tenant for life and remaindermen, rent accruing upon leases executed by the testator of the parties, and becoming due after the termination of the life estate, cannot be apportioned. *Marshall v. Moseley*, 280
2. It is immaterial that the tenancy for life is created by the testator as a provision for his widow. *id*
3. The devisees in remainder of the premises out of which the rent issued, may maintain a joint

action against the executor of the life tenant for rent collected by him, which became due after the termination of the life estate. *id*

ASSESSMENT.

See MUTUAL INSURANCE COMPANIES,
3, 4.
TAXES AND ASSESSMENTS.

AVERAGE.

See INSURANCE, 1-4.

ASSIGNMENT.

[*In trust for creditors.*]

1. The solvency of a debtor, in his own estimation or in fact, does not invalidate his assignment of all or any portion of his property for the payment of his debts. *Ogden v. Peters*, 63
2. An intention to hinder or delay creditors is fraudulent and avoids the assignment, but such intention cannot be inferred from the solvency any more than the insolvency of the debtor. *id*
3. A direction in the assignment to the trustee "to convert the assigned property into cash as soon as the same may conveniently and properly be done" is supererogatory and harmless. *id*
4. The testimony of an assignor, in trust for creditors, that he made the assignment for the purpose of gaining time to pay his creditors and to protect his indorsers, though evidence, is not conclusive upon the question of a

- fraudulent intent to hinder and delay. *Griffin v. Marquardt*, 121
5. A direction to the trustees in the assignment to forthwith take possession of the property, and sell the same without delay, for the best price that can be procured, construed as meaning only that the assignee should sell without unnecessary or unreasonable delay, and not as such an absolute direction for a sale immediately, irrespective of the interest of creditors as would remove the subject from the control of the courts, and thereby avoid the trust. *id*
6. The assignee was directed to pay the amount of certain notes not yet due to the indorsers of the assignor thereupon, and not to the holders: *Held*, that the provision had no other effect than if the holders of the claims were named as the *cestui que trust*. *id*
7. An assignment by a debtor to a creditor of all his personal property and choses in action, for the payment of the debt, with a provision for a return of the surplus, is in effect a mortgage, and not void under the statute of trusts, as for the use of the person making it. *Dunham & Dimon v. Whitehead*, 131
8. Distinction stated between a trust where the whole title vests in the trustee, and a transfer under which the debtor retains a residuary interest, which remains subject to the action of creditors. *id*
9. Such an assignment by an insolvent, held valid, there being no extrinsic evidence of intent to hinder or defraud. *id*
10. A trust to dispose of property at such time and in such manner "as may be most conducive to the interest of the creditors" of the assignor, "and convert the same into money as soon as may be consistent with such interests," construed as not vesting in the assignee any absolute discretion, but as only superfluously stating that which the law would give him, subject to the control of the courts. *Jessup v. Hulse*, 168
11. Such an assignment is not within the condemnation of *Dunham v. Waterman* (17 N. Y., 9) and other cases where the trustee would derive an independent discretion by force of the deed, if valid, and not by operation of law. *id*
12. The appropriation by an insolvent firm of partnership property to the payment of the individual debts of one partner, is not simply void, but is fraudulent and avoids the deed of assignment. *Wilson v. Robertson*, 587
13. So held in a case where the joint assignment included some individual property of the partner whose creditors were preferred, and he had brought into the partnership stock, an amount equal to his individual debts thus preferred, while the other partner contributed to the capital, an insignificant sum, less than the probable excess of the assigned estate after paying the preferred debts of his copartner. *id*
- See BANKS AND BANKING, 7-11.

B

BANKS AND BANKING.

1. Article 8, section 7 of the Constitution of 1846, subjecting the stockholders of banks to personal liability, applies as well to banking corporations then existing as to those created afterwards. *In the Matter of Oliver Lee & Co's Bank*, 9
2. The rule of interpretation by which that construction of a statute is to be avoided, which gives it a retrospective operation, has little if any application in construing the organic law. *id*
3. The provision of the general banking law reserving to the legislature the power to alter or repeal it, forms a part of the contract with every association formed under that act, and the State may modify it prospectively or retrospectively, without infringing the provision of the Federal Constitution against laws impairing the validity of contracts. *id*
4. Such modification may be made, it seems, as well by a change of the State Constitution as by an act of the legislature. *id*
5. The articles of association of a corporation formed in 1844, under the general banking act of 1838, provided that the shareholders should not be individually liable for any contract of the association. It issued circulating notes after 1850 as before: *Held*, that the stockholders are personally liable under the Constitution, and ch. 226 of 1849. *id*
6. Although the issuing of circulating bills after 1850, by which the liability is incurred, be the act of the corporation as such, and not of the stockholders, and although a stockholder be unable to prevent it, the liability attaches in consequence of the exercise of a power which he has conferred upon the corporation, and is therefore within his contract. *id*
7. Associations organized under the general banking law are within the provisions (1 R. S., 603, § 4) prohibiting any incorporated company from making any transfer or assignment in contemplation of insolvency. *Robinson v. Bank of Attica*, 406
8. They are not excluded by the exception (1 R. S., 606, § 11), because, though moneyed corporations, they are, by the construction of the act authorizing their creation, not subject to the "regulations to prevent the insolvency of moneyed corporations," otherwise than as some of those regulations are expressly adopted and applied. *id*
9. The payment of a debt to a *bona fide* creditor is prohibited by the statute, equally with a general transfer of property or an assignment in trust for creditors. *id*
10. A transfer is in contemplation of insolvency, as well where the insolvency actually exists as where it is anticipated. *id*
11. A *dictum* to the contrary, in *Haxton v. Bishop* (3 Wend., 17) disapproved. *id*
12. A draft issued by a banking association, and taking effect by

delivery, but post-dated, is, *it seems*, within the prohibition of the statute (ch. 363 of 1840, § 4), against bills or notes not payable on demand. *Oneida Bank v. Ontario Bank*, 490

13. The case of *Leavitt v. Palmer* (3 Comst., 19), so far as it holds such a draft void, if within the prohibition, questioned, *per Comstock*, Ch. J. *id*

14. Assuming such draft to be void, the party who has taken it upon a loan of money to the bank is entitled to the money advanced by him, either upon the basis of the contract of loan, treating that as valid and rejecting the illegal security, or upon a disaffirmance of the contract, as for money had and received. *id*

15. This right of action is transferred by a sale and indorsement of the draft, although it be held void. *id*

16. The fact that the draft is transferred to a bank which, against the prohibition of the safety fund act (ch. 94 of 1829, § 33), discounts it, having less than sixty days to run, at a greater rate of interest than six per cent, is not available to the drawer as a defence against the same liability which might have been enforced by the original holder. *id*

17. The restriction of the rate of interest is, it seems, designed only for the benefit of the borrower. *id*

[*For Savings.*]

- 18. A regulation of a savings banks requiring the production of the

depositor's pass-book before he should be entitled to receive any payment, is reasonable in a general sense; but proof of the loss of the pass-book, or inability to find after proper search, will excuse the non-production, and entitle the depositor to his money. *Warhus v. Bowery Savings Bank*, 543

19. The rule applied as against the administrator of an intestate, who was a German, having very slight knowledge of the English language, and charged with notice of the regulation only by its being posted, in English, in the banking-room, and printed on the first pages of a signature-book which he subscribed, and in his pass-book. *id*

See EMBEZZLEMENT.

BEER.

See EXCISE.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. The indorser of a promissory note dishonored on Saturday is duly charged where the agent for its collection, not being able to ascertain the indorser's residence, mails notice of its non-payment, on the following Monday, to his principal, and the principal, on the next day after receiving it, mails notice to the indorser. *The Farmers' Bank of Bridgeport v. Vail*, 485

2. It is immaterial whether or not the holder of the note appears upon it as indorser. *id*

3. A party who entrusts another with his acceptance in blank is responsible to a *bona fide* holder, although the blank be filled with a sum exceeding that fixed as a limit by the acceptor. *Van Duzer v. Howe*, 531

4. Though the filling of the blank in violation of the agreement of the parties be a forgery, the acceptor is estopped from setting up the fact. *id*

5. The complaint by the president of a banking association did not aver any negotiation of the bill to the bank. An amendment, supplying such averment, is properly allowed, and, if not so, is a matter of discretion not reviewable on appeal. *id*

See BANKS AND BANKING, 12-15.
USURY.

BOOKKEEPER.

See EMBEZZLEMENT.

BURDEN OF PROOF.

See ADVERSE ENJOYMENT.

CONSTRUCTION OF WRITTEN INSTRUMENTS, 2.

EVIDENCE, 19.

WATER-COURSE, 2, 3.

C

CASES DOUBTED, OVERRULED OR EXPLAINED.

1. *Dictum in Hartun v. Bishop* (3 Wend., 17), disapproved. *Robinson v. Bank of Attica*, 406

2. *Leavitt v. Palmer* (3 Coms., 19), in one particular questioned. *Oneida Bank v. Ontario Bank*, 490

3. *Lampman v. Cochran* (16 N. Y., 275), considered and distinguished. *Clement v. Cash*, 253

4. *Brewster v. Silences* (4 Seld., 210), reviewed and distinguished. *Church v. Brown*, 315

5. *Fay v. Bell* (Lalor's Supp. to Hill and Denio, 251), overruled. *Mallory v. Gillett*, 412

6. *Sweet v. Tuttle* (4 Kern., 465), re-affirmed. *Gardner v. Clark*, 399

7. *Steele v. Whipple* (21 Wend., 103), explained and questioned. *Van Duzer v. Howe*, 531

8. *Briggs v. Davis* (20 N. Y., 16), explained and corrected. *Briggs v. Davis*, 574

CHALLENGE OF JUROR.

1. Where a judge acts as trior upon the challenge of a juror to the favor, his rejection, as immaterial, of evidence offered in support of the challenge cannot be reviewed. *Costigan v. Cuyler*, 184

CHOSE IN ACTION.

See BANKS AND BANKING, 14, 15.

COMMISSIONER OF HIGHWAYS.

See JUDICIAL OFFICER.

CONSANGUINITY.

See JUDICIAL OFFICER.

CONSIDERATION.

See FRAUDS, STATUTE OF, 1.

CONSTITUTIONAL LAW.

1. The power of the Governor to approve and sign a bill presented to him within ten days previous to the adjournment of the legislature does not cease with the adjournment. *The People v. Bowen*, 517
2. A special act for the incorporation of a gas-light company in the city of New York is not unconstitutional by reason of the existence of a general law (ch. 37 of 1848), for the organization of such companies in any city, village or town. Whether a special act is necessary or not rests wholly in the legislative discretion. *id*
3. The propriety of taking private property for a public use is not a judicial question, but one of political sovereignty, to be determined by the legislature, either directly or by delegating the power to public agents, proceeding in such manner and form as it may prescribe. *People v. Herrick*, 595
4. The constitutional provisions for trial by jury, and for due process of law, which control in respect to the mode of ascertaining the compensation to be paid to the citizen upon taking his property, do not apply to the determination of the question whether it is needed for public use. *id*
See BANKS AND BANKING, 1-8.

COUNTERCLAIM.

See FORECLOSURE OF MORTGAGE, 2.
MUTUAL INSURANCE COMPANIES, 5.

CONSTRUCTION OF WRITTEN INSTRUMENTS.

1. Whether those who have executed a written instrument are bound, it not being executed by others named as parties, depends upon the circumstances, and these may be proved by parol. *Chouteau v. Snyder*, 179
2. It rests upon the party who has executed and delivered the instrument to show that the delivery was intended to be in escrow. *id*
3. The execution of an agreement by the assignee of an insolvent, construed under the circumstances as having been regarded as immaterial and waived by the other parties. *id*
4. Where one describes himself as executor in a contract ostensibly made in behalf of the estate, and relating only to matters in which he has no personal interest, the presumption is that he intended to bind the estate, and not himself. It is not to be construed as his personal contract, because signed "A. B., executor," &c., instead of "A. B. as executor," &c. *id*
5. A covenant to assign a bond and mortgage is satisfied without a delivery of the original mortgage, the same having been lost after being recorded. *Clement v. Cash*, 253
6. A covenant to assign an existing mortgage described as having been executed by R. and S. and their wives, held satisfied by the assignment of such mortgage though not executed by the wives of R. and S., it having been given

to secure the purchase money of the mortgaged premises. *id*

7. An agreement to give towards building a church a lease of a house for three years, "which at present rent is \$516," expressing no consideration, but appearing among the signatures to a subscription for that purpose which expressed a valid consideration, construed as a subscription for the amount of the rent. *Trustees of First Baptist Society in Syracuse v. Robinson*, 234

8. The reference to the lease does not make an agreement to demise the house, but merely designates the fund by which the subscription was measured, and from which the defendant expected to pay it. *id*

See AGREEMENT, 5.

ASSIGNMENT, 3, 5, 10.

BANKS AND BANKING, 2.

CORPORATION, 3-6.

DAMAGES.

EMBEZZLEMENT, 1.

EVIDENCE, 4.

CORPORATION.

1. Whether a judgment recovered against a corporation is any evidence of its indebtedness in an action against a stockholder to enforce his individual liability, *Quera. Belmont v. Coleman*, 96
2. A recovery against the stockholder, sustained upon a referee's finding of the fact that the judgment against the corporation was upon a bill of exchange drawn by its agent upon and accepted by the corporation. *id*

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3. The defendant, a corporation organized for the purpose of manufacturing linen goods, sold to the plaintiff a stock of miscellaneous merchandise in a store belonging to it, upon the agreement that if the trustees then in office should, within a year, cease to have the management of the affairs of the company, and in consequence thereof the general trade of its operatives should be diverted from such store to the plaintiff's damage, the defendant would rebate \$300 of the price of the goods or pay that sum to the plaintiff.

Held, the defendant, in the absence of contrary evidence, is to be presumed to have obtained the merchandise in exchange for its manufactures, in payment of debts or some other legitimate exercise of its corporate powers. *De Groff v. American Linen Thread Company*, 124

4. The power to affix conditions in respect to the price is incident to the power of the corporation to sell the property, and the contract is therefore valid. *id*

5. New trustees having been substituted within the year, the liability of the corporation is established by evidence of a diversion of the trade of its employees to the prejudice of the plaintiff, without any active interposition of such trustees to produce that result. *id*

6. The by-laws of a corporation having nine directors, established certain days for regular meetings, and provided that when at such a meeting less than a quorum but

three or more directors should be present, they should have power to adjourn to any time prior to the next regular meeting: *Held*, that five directors, or a majority of them, at such an adjourned meeting may exercise the ordinary corporate powers although the absentees have no other notice of the meeting than that with which they are chargeable from the by-law. *Smith v. Law*, 296

[*Foreign.*]

7. User of corporate franchises, under color of an act authorizing the incorporation, together with recognition of such character by the defendant in his dealings, is evidence of a corporation *de facto*, available to a foreign corporation suing in this State, as well as to a domestic one. *The Bank of Toledo v. The International Bank*, 542

See BANKS AND BANKING.

CONSTITUTIONAL LAW, 2.

MANUFACTURING CORPORATION.

MUNICIPAL CORPORATION.

RELIGIOUS SOCIETY.

COSTS.

1. In an action for the diversion of water, the complaint alleging the plaintiff to be the owner and in possession of land, and entitled to the benefit of the stream which had run and flowed upon it, and of right ought to do, a general denial of each and every allegation presents no claim of title so as to give costs to the plaintiff under § 304 of the Code when he recovers less than \$50 damages. *Rathbone v. McConnell*, 466

2. Nor does a claim of title arise from an allegation in the answer that the diversion was "with the leave, license, permission and consent of the plaintiff first made, given and granted," for the purpose of feeding an aqueduct for the supply of a village. These words do not import any grant, but a parol license. *id*

CRIMINAL LAW.

1. The guilt of a prisoner depending upon the credibility of evidence given by an accomplice, it is no error to charge the jury that they might take into consideration the omission of the prisoner to contradict the accomplice upon a statement in respect to which, if false, contradictory evidence was apparently within the prisoner's power. *The People v. Dyle*, 578

D

DAMAGES.

1. The sum named in a contract as liquidated damages for its non-performance will not be construed as a penalty, although it appears too large for a breach of some of the conditions and too small for others, where all the conditions are to be simultaneously performed, *e. g.*, where the agreement is to convey land, pay money and assign securities for money at the same time, and as the consideration of a conveyance then to be executed by the other party. *Clement v. Cash*, 253

2. *Lampman v. Cochran* (16 N. Y., 275), considered and distinguished. *id*

See WATERCOURSE, 5.

DEBTOR AND CREDITOR.

See ASSIGNMENT.

MORTGAGE, 4, 5.

DEDICATION.

1. The owner of land in a village intending a dedication to the public, opened and fenced out an avenue, from a public highway through his premises, but communicating with no highway except at one end. It was, by his consent, designated as an avenue, upon a published map of the village, and all persons freely used to drive and walk upon it for more than two years: *Held*, that these circumstances do not establish an irrevocable dedication. *Holdane v. Trustees of the Village of Cold Spring*, 474
2. In order to preclude the owner of land from revoking a dedication of a highway however decisively his intention to dedicate be manifested, there must be an acceptance, either by formal act of the public authorities, or by common use under circumstances showing a clear intent to accept and enjoy the easement for the specific purpose of the proposed dedication. *id*
3. *Aliter* as against individuals who have acquired private rights with reference to such dedication. *id*

4. Whether an avenue communicating with a highway only at one end, is a highway, or capable of being made such by dedication or otherwise, *Quere.* *id*

DEPOSIT.

See BANKS AND BANKING, 18, 19.

E

EASEMENT.

1. The qualification of a grant of lands, by the words "grass herbage, feeding and pasturage only excepted," if not good as an exception or reservation, is effectual to create an easement in the grantor to enter and depasture the lands. *Ross v. Dunn*, 275
2. Where the grantor retains such an easement, and the grantee has the right to plow and plant such arable parts of the tract granted as he may elect, with general liberty to take timber for fencing without restriction to the arable land, and subject to a provision requiring him to leave the lands he may till unclosed by fences from October to April, the duty of fencing is upon the grantee; and in defect of fences he cannot distrain the grantor's cattle damage feasant. *id*
3. Where the owner of land has, by any artificial arrangement, effected an advantage for one portion, burdening the other, upon a severance of the ownership the holders of the two portions take

them respectively charged with the servitude and entitled to the benefit openly and visibly attached at the time of the conveyance of the portion first granted. *Lampman v. Milles*, 505

4. Accordingly, where the owner of land across which a stream flows has diverted it through an artificial channel so as to relieve a portion of it formerly overflowed, which he then conveys, neither he nor his grantees of the residue can return the stream to its ancient bed to the damage of the first grantee. *id*

5. Such benefits, not naturally attached to the premises purchased, but previously conferred upon it at the expense of the other land of the grantor, do not depend upon covenant, but remain attached to the tenement conveyed, unless the right to subvert them is expressly reserved. *id*

6. The rule, which is general in its application to easements which are continuous, i. e., self-perpetuating, independently of human intervention, as the flow of a stream, is, it seems, restricted in the case of discontinuous easements to such as are absolutely necessary to the enjoyment of the property conveyed. *id*

See ADVERSE ENJOYMENT.

WATERCOURSE.

EMBEZZLEMENT.

1. A bond conditioned for the faithful discharge by one of the obligors of "the trust reposed in

him as assistant book-keeper" of a bank, is an engagement that he will not avail himself of his position to misapply or embezzle the funds of his employer. *Rochester City Bank v. Elwood*, 88

2. The appropriation by the book-keeper of the bank's money and making fraudulent entries to avoid detection is a breach of the bond as against a surety therein. *id*

3. It is immaterial that the embezzlement was committed while the book-keeper was employed in keeping a journal which, when he entered upon his duties, and usually, was kept by the teller, and that the fraudulent entries were made in such journal. *id*

ERASURE.

See EVIDENCE, 19, 20.

ESCROW.

See CONSTRUCTION OF WRITTEN INSTRUMENTS, 2.

ESTOPPEL.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 3, 4.
DEDICATION, 2, 3.

EXECUTORS AND ADMINISTRATORS.

5. The act (ch. 80, of 1847) to authorize executors and administrators to compromise claims, is not restrictive of their common law powers, but designed to afford

them additional protection in its exercise.

See CONSTRUCTION OF WRITTEN INSTRUMENTS, 4.

EVIDENCE.

1. In an action for an assault and battery committed in the absence of witnesses, ill-will on the part of the defendant towards the plaintiff is admissible as a part of the circumstantial evidence to determine by whom the assault was committed. *Jewett v. Banning*,

254

2. The plaintiff charged the defendant with having committed the assault, and he denied it. The evidence warranted the jury in finding that the charge was repeated at the same place, and in the presence of additional witnesses, shortly afterwards, without a repetition of his denial by the defendant: *Held*, no error in the judge to submit it to the jury to give such weight to the defendant's omission again to repel the charge, as under the circumstances it might be entitled to. *id*

3. In ejectment for land claimed to be conveyed by a sheriff's deed upon sale under execution, parol evidence is admissible, that the sheriff at the sale expressly excepted the land out of a larger tract offered by him for sale. *Bartlett v. Judd*,

200

4. The exception in the sheriff's deed of land "conveyed by A. B." to the defendant, construed as covering land conveyed to the latter, through mesne conveyances, by A. B's grantees. *id*

5. The sheriff's deed reformed in accordance with the facts, and the demand of the defendant in his answer. *id*

6. The statute of limitations, if ever a bar to such relief upon the application of a defendant, does not commence running until he is charged with knowledge of the plaintiff's assertion of a claim, under the deed, inconsistent with the actual exception made at the sale. *id*

7. The will of Sir William Johnson, made in 1774, asserting his title, under letters patent from the British Crown to a tract of over ninety thousand acres, called Kingsland, together with recitals in private acts of the legislature, admitting the fact of such a grant and asserting the forfeiture of the estate by reason of the treason of Sir William and some of his devisees, *Held*, no evidence of the fact that such a grant had been made by the Crown as against a person not shown to claim title under the People of this State by grant subsequent to the Revolution. *McKinnon v. Bliss*,

206

8. There is no presumption against one in possession of land, that his title is derived from the People and not from the Crown of Great Britain or the Colonial Government. *id*

9. The assertion of title in a deed or will, however ancient, is never evidence in favor of persons claiming under the person who executed the instrument, nor against strangers, except when supported by other proof of a long continued

- and undisputed possession, in accordance with the title asserted. *id*
10. The recitals in a public statute are admissible, it seems, in suits between private individuals only as *prima facie*, and not as conclusive evidence of the facts therein stated; *per* SELDEN, J. *id*
11. The recitals in a private statute, are, in general, evidence that the facts were so represented to the legislature, and not that they actually existed. *id*
12. Where such recitals appear to be based upon the information of public officers specially charged with the duty of ascertaining the truth of the representations upon which the legislature acted, although they may operate as admissions against the State or its subsequent grantees, they do not affect those who are in no manner parties to them. *id*
13. A party relying upon historical facts must produce some evidence thereof to the jury. The court, upon appeal from a nonsuit, will not take judicial notice of such matter which was not presented upon the trial. *id*
14. Whether an historical work may be read in evidence while its author is living and might be called as a witness, *Quere.* *id*
15. A local history, *e. g.*, that of Herkimer county, is not, it seems, admissible evidence. To warrant its introduction, it must relate to such facts as are of a public and general nature, and of interest to the whole State. *id*
16. That the Letters Patent for the Royal Grant, a tract including many thousand acres and now occupied by several thousand persons, were buried in the ground by the descendants of the patentee during the Revolution, and thus perished by decay, is, it seems, a fact which from its nature and the necessity of the case may be proved by tradition. *id*
17. Such evidence, however, is inadmissible without proof that the residents upon the Royal Grant generally held their possessions and claimed their titles under the alleged patent, and thus had an interest in acquainting themselves with its history. *id*
18. The written receipt of a mortgagee, the date of which was not proved otherwise than by the writing itself, is not evidence against the assignee of the mortgage subsequent to such date, of a payment by the mortgagor. *Foster v. Beale*, 247
19. Where a public document, prepared by a sworn officer, is produced by the officer to whose custody the law entrusts it, the party offering it in evidence is not required to explain a rasure and alteration visible upon its face and appearing to have been made at the same time and by the same hand as the obliterated letters and figures. *The People v. Minck*, 539
20. The return of inspectors of election, not otherwise impeached than by such alteration, is *prima facie* evidence on *que war-*

rento of the number of votes cast for a candidate. *id*

See AGREEMENT, 6.
ASSIGNMENT, 4.
CORPORATIONS, 1, 7.
SHERIFF, 4.
SHIPS AND VESSELS, 2.

EXCISE.

1. Strong beer is within the meaning of the terms "strong and spirituous liquors," in the statute (ch. 628 of 1857) to suppress intemperance. *The Board of Commissioners of Excise of Tompkins County v. Taylor*, 173

2. *It seems* that any liquor is within the statute, whether fermented or distilled, of which the human stomach can contain enough to produce intoxication. *id*

F

FENCES.

See EASEMENT, 1, 2.

FRAUD.

1. The vendor of land is responsible for material misrepresentations in respect to its location and qualities made by his agent without express authority and in the absence of any actual knowledge by either the agent or the principal whether the representations were true or false. *Bennett v. Judson*, 238

2. One who, without knowledge of its truth or falsity, makes a material misrepresentation, is guilty

ty of fraud as much as if he knew it to be untrue. *id*

3. The fraud, it seems, is well stated in pleading as that of the principal; and if otherwise, and it appears at the trial to be that of an agent without any participation of his principal, the variance is the subject of amendment and will be disregarded upon appeal. *id*

See WARRANTY, 3-5.

FRAUDS, STATUTE OF.

1. A written undertaking to be responsible "for all such goods as W should buy of C," indorsed upon, and executed at the same time with, a contract between W and C for the purchase and sale of the goods, contains a sufficient expression of the consideration to be valid under the statute of frauds. *Church v. Brown*, 315

2. The guaranty, without reference to the contract on which it is indorsed, discloses that the consideration is the delivery of the goods at the request of the guarantor: such request is in effect stated in the engagement to be responsible for goods to be delivered to another. *id*

3. This case distinguished from *Brewster v. Silence* (4 Seld., 210), and the latter reviewed and disapproved by Comstock, Ch. J. *id*

4. The defendant making a purchase agreed to deliver, in part payment, the chattel note of a third person, and said the maker was good, and he would warrant the

plaintiff would get the chattel when the note became due: *Held*, that the guaranty was not within the statute of frauds. *Cardell v. McNiel*, 336

5. The undertaking by parol being valid, it was not waived by the plaintiff's acceptance of the note without any written guaranty. *id*

6. The guaranty construed as for the payment and not for the collection of the chattel note. *id*

7. The plaintiff, having in his possession a canal boat belonging to A, and having a lien upon it for repairs made by him, delivered the boat to A, at the defendant's request, and upon his verbal promise to pay the amount due for such repairs: there being no new consideration moving to the defendant, his promise is void under the statute of frauds. *Mallory v. Gillett*, 412

8. The cases not within the statute, though the promise relates to an existing debt of a third party, thus classified, *per* Comstock, Ch. J.:

1. Where there is no original debt to which the promise is collateral, *a. g.*, where the promisee is a mere guarantor to another for a third person, and the promisor agrees to indemnify him; or where his demand was founded upon tort.

2. Where the original debt is extinguished, and the creditor has no remedy but on the new promise, *a. g.*, where the new undertaking is accepted as a substitute for the original demand; or where the

demand being deemed satisfied by the arrest of the debtor's person or a levy upon his goods, the arrest or levy is discharged by the creditor's consent.

3. Where, although the original debt remains, the new promise is founded upon a consideration which moves to the promisor, *a. g.*, when it comes from the debtor, where he put a fund in the hands of the promisor by absolute transfer or upon trust to pay the debt; or it came to the promisor's hands charged with the debt as a prior lien; or where the consideration originates in an independent dealing between the creditor and the promisor, as where the latter, for a stipulated compensation, guarantees the payment to him of a sum due by a third person; or where the creditor transfers the debt of A to B, and, upon sufficient consideration, guarantees it by parol. *id*

9. Numerous cases reviewed and explained, and *Fry v. Bell* (Lalor's Supp. to Hill and Denio, 251), overruled. *id*

GUARANTY

See FRAUDS, STATUTE OF, 2, 7.

HIGHWAY

1. The statute in relation to highways on Long Island (ch. 56, of 1830), does not entitle the owners of land to be taken to notice of the application to the commis-

sioners to determine upon the expediency of making the appropriation, nor of the hearing before the county judge upon an appeal from the commissioners' refusal to lay out a highway. *The People v. Smith*, 595

See DEDICATION.

JUDICIAL OFFICER.

FORECLOSURE OF MORTGAGE.

1. The notice of foreclosure of a mortgage by advertisement sufficiently specifies the place where the mortgage is recorded, by stating the clerk's office and the date of record, though the number of the book in which it is recorded is erroneously stated. *Judd v. O'Brien*, 186
2. It is essential that the notice should declare that the mortgage will be foreclosed by sale. A mere notice of the sale of the mortgaged premises, without declaring it to be for the purpose of foreclosure, or in execution of the power of sale contained in the mortgage, is insufficient. *id*
3. In an action for the foreclosure of a mortgage to secure the purchase money of the premises, one of the defendants, against whom no personal claim was made, set up by way of answer that he had purchased the premises of the plaintiff's grantee (who was also a party defendant, and against whom a judgment for the mortgage debt was asked): and had become the assignee of the plaintiff's covenants against incumbrances and of warranty: and

had been evicted by paramount title under certain taxes, which were incumbrances at the time of the plaintiff's grant: Held, that these facts did not present anything which he could interpose, either by way of defence or counterclaim, to a foreclosure of the mortgage. *National Fire Insurance Company v. McKay*, 191

FRAUDULENT CONVEYANCE.

See ASSIGNMENT.

BANKS AND BANKING, 7, 9, 10.

I

INNKEEPER.

1. Personal notice to a guest at an inn that a safe is provided for keeping money, jewels, &c., and that the innkeeper will not be liable for their loss, unless given to him for deposit therein, is equivalent to the posting in the guest's room of a written or printed notice, under the statute (ch. 421 of 1855). *Purvis v. Coleman & Stetson*, 111
2. Independent of the statute, the leaving by the guest of \$2,000 in gold coin in his trunk in a room, with no person therein, in a hotel in the city of New York, after such actual notice, is such negligence as to discharge the innkeeper from any liability. *id*

INTOXICATING LIQUOR.

See EXCISE.

INSURANCE.

[Marine.]

1. The liability to general average continues until the property has been completely separated from the rest of the cargo and from the whole adventure, so as to leave no community of interest remaining. *Nelson v. Belmont*, 36
2. If the enterprise is not abandoned, and the property, although separated from the rest, is still under the control of the master of the vessel and liable to be taken again on board for the purpose of prosecuting the voyage, the common interest remains and whatever is done for its protection is done at the common expense. *id*
3. The cargo of a vessel being on fire, the master transferred a quantity of specie to another ship, which by his request convoyed him into a port of distress. He there incurred expenses in putting out the fire and repairing damages to the vessel, the specie being meantime deposited in a bank. The damages were found to be such that the cargo was sold and the voyage abandoned: *Held*, that the specie was liable in general average for the expenses at the port of distress. *id*

See MUTUAL INSURANCE COMPANIES.
SHIPS AND VESSELS.

J

JOINT AND SEVERAL
DEBTORS.

1. In an action against three persons, as partners, one not being

served with the summons, nor appearing, the plaintiff is entitled to judgment against the other two, upon evidence that they, alone, constituted the partnership. *Pruyn v. Black*, 300

2. "Defendants severally liable," in sub. 2, § 136, of the Code, construed as meaning defendants liable separately from the defendants not served, though jointly as respects each other. *id*

JUDICIAL OFFICER.

1. A commissioner of highways is not a judicial officer within the statute prohibiting judges taking part in proceedings in which a relative within the ninth degree is interested. *The People v. Wheeler*, 82
2. The applicant for the discontinuance of a highway is not a party within the meaning of the statute. The public is the real party in interest. The applicant acts on its behalf. *id*

JUDGMENT.

See CORPORATION, 1, 2.

L

LAW DAY.

See MORTGAGE, 2.

LIMITATION OF ACTIONS.

See EVIDENCE, 6.

LIEN.

See MORTGAGE, 2.

M

MANUFACTURING CORPORATION.

1. The default of a manufacturing corporation, organized under the general act (ch. 40 of 1848), to publish in the first twenty days of January, the statement required by section 12 of that act, imposes a personal liability upon the trustees in office for all corporate debts existing while they are in default; but not, it seems, for debts contracted after their retirement from office. *Boughton v. Otis*, 261
2. A trustee coming into office after a default, is personally liable for such debts only as are contracted while he is in office, and before a report is made and published. *id*
3. Whether a trustee not in office during the first twenty-one days of the January next before or after the contracting of the debt is in any case liable, *Quere. id*

See TAXES AND ASSESSMENTS.

MORTGAGE.

[Assignment of.]

1. The failure to produce a mortgage at the time of receiving a payment, with the suggestion of a false reason to excuse it and the insolvency of the mortgagee, held insufficient, as matter of law, to put the mortgagor upon inquiry and charge him with notice that

the mortgage had been assigned.
Foster v. Beals, 247

[Tender after due.]

2. Tender of the money due upon a mortgage, at any time before foreclosure, discharges the lien, though made after the law day, and not kept good. *Kortright v. Cady*, 343
3. Where, as in this case, the tender does not discharge the debt, but only defeats a particular remedy, it is unnecessary to show continued readiness to pay or to bring the money into court. *id*

[Equitable.]

4. Upon receiving a grant of land the grantee executed an agreement, not under seal, to support and maintain the grantor, pledging for that purpose the produce of the land, and should that prove insufficient, appropriating the entire fee. This agreement being the consideration of the grant, takes effect as an equitable mortgage of the land. *Chase v. Peck*, 581
5. The grantee becoming insolvent and unable to perform his contract to maintain the grantor, reconveyed the land partly for the purpose of thus providing for the support of the grantor and partly to hinder and delay creditors: *Held*, that a judgment creditor purchasing the land, upon sale on execution, took subject to the equitable mortgage. *id*
6. Under the practice established by the Code, the equitable mortgagee is entitled to prevail against an action to recover the possession of the land by the purchaser; the remedy of the latter is by suit to

redeem from the mortgage, and for an accounting if necessary. *id*

See ASSIGNMENT, 7.

CONSTRUCTION OF WRITTEN INSTRUMENTS, 5, 6.

EVIDENCE, 18.

FORECLOSURE OF MORTGAGE, 1, 2.

MUNICIPAL CORPORATION.

1. The city of Buffalo employed the plaintiff to pave a street and furnished sand for that purpose under a contract by which it was to grade the street, and the work of paving, &c., was to be performed under the direction of its street commissioner. The city so excavated the street as that a quantity of sand beyond that specified in the contract was necessary to bring up the paving to the grade established, and the plaintiff, by direction of the street commissioner, furnished the excess required: *Held*, that he was entitled to compensation therefor by the city. *Messenger v. City of Buffalo*, 196

2. The authority of the corporation is to be implied from its having, by its own act, rendered the extra material necessary to conform the work to the conditions of the contract. *id*

MUTUAL INSURANCE COMPANIES.

1. A company, organized under the general act (ch. 308 of 1849) to insure on the plan of mutual insurance, has power to issue policies upon the payment of a fixed premium, without provision for any contingent liability of the

insured. *Mygatt v. New York Protection Insurance Company*, 52

2. The act makes all parties insured members of the corporation, and entitled to share in the profits of its business. The contingent benefit thus secured by taking out a policy for a cash premium, is sufficient to constitute the insured an insurer to the extent of his interest, and to bring the transaction within the principle of mutuality. *id*

3. The words "term of insurance," in section 6 of the act to incorporate the Jefferson County Mutual Insurance Company (ch. 41, of 1836), mean the term of time for which by the policy the insurance was to continue. *Bangs v. Skidmore*, 136

4. One insured in a company subject to the provisions of that act, continues liable to assessment upon his premium note for any losses incurred during the term specified in his policy, although his property insured be destroyed long previous to its expiration. *id*

5. A member of a mutual insurance company cannot, upon its insolvency, set off against his indebtedness for premiums due upon policies, a loss sustained by him adjusted and payable by the company. *Lawrence, v. Nelson*, 158

6. The premiums constitute a fund which as insurer he is bound to make good for the benefit of all creditors. In his quality of assured he is bound to take a *pro rata* dividend from such fund, and can secure no preference over

other creditors, by reason of his being also a debtor. *id*

N

NEGLIGENCE.

See INNKEEPER.

PRINCIPAL AND AGENT, 2.
SHERIFF, 2, 3.

NOTICE.

See AGREEMENT, 7.

BILLS OF EXCHANGE AND PROMISSORY NOTES.
CORPORATION, 6.
EVIDENCE, 6.
FORECLOSURE OF MORTGAGE, 1, 2.
HIGHWAY.
INNKEEPER, 1.
SALE OF LAND UPON EXECUTION.

P

PARTIES TO ACTION.

See APPORTIONMENT OF RENT, 3.

JOINT AND SEVERAL DEBTORS.
JUDICIAL OFFICER.

PENALTY.

See DAMAGES.

PLEADING.

1. Matter in abatement, *e. g.*, the pendency of a former suit for the same cause of action, is properly joined in the same answer with a defence in bar. *Gardner v. Clark*, 399
2. *Sweet v. Tuttle* (4 Kern., 465), in this respect reaffirmed. *id*

3. Where the case goes to the jury upon both defences, it is the duty of the judge to require a separate verdict upon them. *id*

4. Whether the pendency of an action by the original owner of a claim is pleadable in abatement to the prosecution of a suit for the same cause of action by an assignee thereof subsequent to the commencement of the first action, *Query*, per SELDEN, J. *id*

5. That the defendant was arrested upon a *copias*, at the suit of the assignor, is not a good plea of a former action pending for the same cause; and it not appearing that a declaration was filed or served, the pleading is not helped by the averment that the *copias* was for the same identical cause of action. *id*

6. The precision required in stating the facts essential to make out the defence of usury, has not been relaxed by the Code. *Manning v. Tyler*, 567

7. Where the answer avers usury in general terms, without stating the *quantum*, or a corrupt agreement for its payment, the plaintiff is entitled to judgment for its frivolousness, and need not move to make it more definite and certain. *id*

See AGREEMENT, 3.

COSTS.

FRAUD.

MORTGAGE, 3.

PRACTICE.

See ARBITRATION AND AWARD.

JOINT AND SEVERAL DEBTORS.
PLEADING, 7.

PRESUMPTIONS AND PRESUMPTIVE EVIDENCE.

See ADVERSE ENJOYMENT, 2.

APPEAL.

CONSTRUCTION OF WRITTEN INSTRUMENT, 2, 3.

CORPORATION, 3.

EVIDENCE, 8.

WATERCOURSE, 1, 3.

PRINCIPAL AND AGENT.

1. Where the instructions of an American owner of flour to his factor at Liverpool were to withhold it from sale until an expected act of Parliament had produced its results upon the market, the latter is not chargeable with a breach of instructions in selling prematurely, if he wait a considerable time after the passage of the act and then sell in good faith and with reasonable prudence. *Milbank v. Denniston*, 386

2. Under such instructions, the factor has a discretion, after the market has remained a considerable time under the influence of the new law, to judge whether the measure has produced its full effect upon the market; and he is not liable for an error in judgment in that respect. *id*

3. The evidence being in no respect contradictory, it was error to submit to the jury whether there was a breach of instructions. *id*

See AGREEMENT, 4.

FRAUD.

MUNICIPAL CORPORATION, 2.

USURY, 1.

VERDICT SUBJECT TO OPINION OF THE COURT.

R

REFORMATION OF DEED.

See EVIDENCE, 8, 5.

REGISTER.

See SHIPS AND VESSELS, 3.

RELIGIOUS SOCIETIES.

1. Corporations formed under section 3 of the act for the incorporation of religious societies (ch. 60, of 1813), have no denominational character, and none can be engrafted upon them. *Petty v. Tooker*, 267

2. The legal character of the corporation is not affected by the existence or non-existence, or ecclesiastical connection, doctrines, rites, or modes of government of a church or churches formed by the corporators. The existence of the latter as organized bodies is not recognized by our municipal law. *id*

3. Persons otherwise qualified do not lose their right as corporators to vote at elections by reason of their having individually, or collectively, renounced the doctrine and ecclesiastical government professed and recognized by the religious body in whose worship and services the corporate property had always been employed. *id*

4. The title of trustees to office and to the control of the corporate property, is not impaired by any aberration in doctrine or church government on their part, or on that of those by whom they are elected. *id*

5. The trustees can determine, by their control of the corporate pro-

perty, who shall conduct the religious exercises. The only restraint is in the power of the corporators to fix the salary of the person employed. *id*

6. They have, also, the power, it seems, to make such regulations in respect to the renting and occupation of pews as to exclude persons holding obnoxious opinions from becoming attendants upon worship, and thereby obtaining a right to vote. *Per SELDEN, J. id*

7. It is only in this way, or by express condition affecting the grant of the corporate property, that its use can be restricted to the propagation of any particular form of religious belief or ecclesiastical organization. *id*

RENT.

See APPORTIONMENT OF RENT.

S

SALE OF LAND UPON EXECUTION.

[*Notice of.*]

1. It is sufficient notice of the sale of real estate upon execution, to post a notice as required by the statute forty-two days previous to the sale and publish a copy thereof in six successive numbers of a weekly newspaper although the first publication may be less than six weeks prior to the sale. *Olcott v. Robinson,* 150

See EVIDENCE, 3, 6.

SEAWORTHINESS.

See SHIPS AND VESSELS.

SHERIFF.

1. The plaintiff brought replevin against the master of a vessel lying at a pier in New York for her cargo of coal. The sheriff declining to deliver the coal to the plaintiff till his sureties should justify, put a keeper in charge of the coal with the consent of the master. The vessel sunk at the wharf, and the plaintiff brought this action to recover the damages sustained by the coal, and the expense of raising it: *Held*, the sheriff did not, under the circumstances, become an insurer of the coal by not removing it from the vessel. *Moore v. Westervelt,* 10

2. Whether he was guilty of negligence in not taking proper precautions for the security of the vessel, was, under the circumstances, a question for the jury. *id*

3. *It seems*, that a sheriff having in his custody property which is the subject of litigation, is responsible for more than ordinary diligence. *id*

4. A bill of lading, executed by the master of the vessel, is not admissible as any evidence of the quantity of coal on board the vessel. *id*

5. A sheriff having levied an execution upon sufficient property, which is taken from his possession under a replevin in which he obtains judgment, it is his duty to prosecute the sureties in the undertaking of the plaintiff in replevin. *Swezey v. Lott,* 481

6. The sheriff is not entitled to indemnity from the plaintiff in the execution, as a condition of his prosecuting the undertaking. *id*

7. In an action against the sheriff for not returning the execution no excuse for his not prosecuting the undertaking in replevin being shown, except the absence of an indemnity for costs, the sheriff is liable for the amount of the debt, and cannot sustain a counterclaim for expenses in the replevin suit.

42

See EVIDENCE, 3, 6.

SALE OF LAND UPON EXECUTION.

SALE AND DELIVERY OF CHATTELS.

See AGREEMENT, 5-9.
WARRANTY.

SHIPS AND VESSELS.

1. Where the actual navigation and discipline of a vessel are entrusted by the owner to a competent sailing master, the implied warranty of seaworthiness, in this respect, is satisfied, although another person, having no nautical skill, and who, in fact, acted only as supercargo, is named in the ship's register as master. *Draper v. The Commercial Insurance Company*, 378
2. The authority of master is vested in that person to whom it has been actually delegated by the owner. The registry is *prima facie* evidence on that subject, but not conclusive.
3. The effect of the act of Congress in relation to the registry of vessels is only to confine the benefits of an authenticated national character to such vessels as are registered in conformity to its terms. It has, of itself, no effect

upon a contract of insurance, or the question of seaworthiness arising under it. 42

STOCKHOLDER.

See BANKS AND BANKING, 1, 5, 6.
MUTUAL INSURANCE COMPANY.

T

TAXES AND ASSESSMENTS.

1. The location, for the purposes of taxation, of a manufacturing corporation organized under the general act (ch. 40 of 1848) is the place designated in its certificate as that where the operations of the company are to be carried on. *The Oswego Starch Factory v. Dalloway*, 449
2. It is immaterial that the principal office or place for transacting the financial concerns of the company is located in a different town. 42
3. For the purpose of taxing corporations under the statute, as amended in 1857 (ch. 456 of 1857, § 3), its stock is to be assessed at its actual value, whether above or below the nominal par, and this irrespective of its possessing any surplus capital or reserved funds. 42
4. *So held*, where such a corporation had no surplus or reserved funds, but made annual dividends of all its profits, amounting to fifteen per cent and upwards, and the company was assessed for its capital at a valuation of seventy-five per cent above par. 42

TENDER.

1. The tender of a deed to one of the joint contractors for the purchase of land is sufficient; upon his refusal to accept, the vendor is under no obligation to make a tender to the other. *Carman v. Pultz*, 547

See MORTGAGE, 2, 3, 5.

TRUST.

[For sale of Land.]

1. Where there is a valid trust for the sale of land, the party creating the trust and those holding derivative titles under him, have no rights legal or equitable until the purposes of the trust are satisfied. *Briggs v. Davis*, 574
2. Their interests are subject to the execution of the trust absolutely; so that a subsequent grantee, from the creator of a trust to sell for the payment of debts, acquires no right to redeem the land. *id*
3. The decision in this case (20 N. Y., 16) corrected accordingly. *id*

See ASSIGNMENT, 7, 8.

U

USURY.

1. An agent entrusted with money to invest at legal interest exacted a bonus for himself as the condition of making a loan, without the knowledge or authority of his principal: *Held*, that this did not constitute usury in the principal nor affect the security in his hands. *Condit v. Baldwin*, 219

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2. The drawer of a bill of exchange for \$1,200 paid \$50 to an accommodation indorser for his indorsing, procuring another indorser and obtaining its discount. From the proceeds, the indorser retained \$150 previously loaned by him to the drawer: *Held*, that the draft was not affected by usury. *Van Duzen v. Howe*, 531
3. The head-note to *Steele v. Whipple* (21 Wend., 103), corrected, and the case itself questioned, by DENIO, J. *id*

V

VERDICT SUBJECT TO OPINION OF THE COURT.

1. On a verdict subject to the opinion of the court, the question is, who is entitled to judgment upon the facts established, and when the objection has not been taken at the trial, the verdict may be supported upon any theory consistent with the facts, though not suggested by the pleadings. *Oneida Bank v. The Ontario Bank*, 490

W

WAIVER.

See AGREEMENT, 7, 8.

FRAUDS, STATUTE OF, 4, 5.

WARRANTY.

1. Upon the sale of a chattel by the manufacturer, a warranty is implied that the article sold is free from any latent defect growing out of the process of manufacture. *Hoe v. Sanborn*, 553

2. When, however, there is a latent defect in the materials employed, the manufacturer is liable as upon implied warranty, only where it proved, or is to be presumed that he knew of the defect. *id*

3. It seems that the theory of the common law in respect to implied warranties, rests upon the deceit of the vendor in not disclosing defects of which the probability of his knowledge is so great that its existence is presumed. *id*

4. Where the knowledge of the vendor can be proved by direct evidence, his responsibility rests on the ground of fraud. *id*

5. The difference between the two cases is, that in the one the *scienter* is actually proved, in the other it is presumed. *id*

6. The reasons of agreement and of diversity between the common law and the civil law in this respect, stated by SELDEN, J. *id*

See FRAUDS, STATUTE OF, 4, 7.
SHIPS AND VESSELS, 1.

WATER-COURSE.

1. The plaintiff of whose title there was no evidence except possession for six years, during that time acquiesced, and his predecessors in the possession had for ten years previously acquiesced, in the diversion of a water-course by the occupant of land higher up the stream. In an action for damages from such diversion:

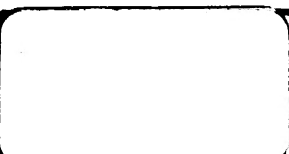
Held, that no acquiescence short of twenty years repels the presumption that the diversion of a water-course was in hostility to the rights of the riparian proprietors, or authorizes the presumption either of grant or of license. *Haight v. Price*, 241

2. The plaintiff is not put to any proof of the circumstances under which the diversion began, or who was the owner of the premises affected, but may rest on the principle that a diversion is to be deemed wrongful in the absence of proof establishing the right affirmatively. *id*

3. That the premises injured by the diversion, and those on which it was made, were then held by the same owner, and the plaintiff came into possession under his title, in subordination to his right to continue the diversion, or as an intruder, are facts, the burden of proving which is on the defendant, and which cannot be presumed in his favor.

4. A part of the injury resulting to the plaintiff from the destruction of an aqueduct erected by the defendant to lessen the effect of the diversion; it is no defence that such destruction was caused in part by a dam built by the plaintiff on his own land, which would have produced no injury at the place of the defendant's aqueduct, if the channel had there remained in its natural condition.

See ADVERSE ENJOYMENT, 1, 2.

HARV  BRARY

